Journal

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The President's Page

William J. Jameson

■ The increasing interest in the work of the organized Bar, as manifested by record attendance this year at all state bar association meetings, is due in no small measure to the excellent programs presented in the field of continuing legal education.

Leadership in this program is furnished by the Committee on Continuing Legal Education of the American Law Institute collaborating with the American Bar Association. It is believed that this program can be made more effective through a wider understanding of the origin and purposes of the organization. In 1946, a special Committee of the American Bar Association was created to make a study and recommendations regarding the development of a program of continuing training for lawyers on a nation-wide basis. The recommendations of that committee were carried into effect in 1947 in the form of an agreement between the American Bar Association and the American Law Institute which provides:

> 1. The American Law Institute undertakes to organize, develop and carry out a national program of continuing education of the Bar with the co-operation of the American Bar Association.
>
> 2. The American Bar Association recognizes the American Law Institute as the national agency for the carrying out of this program of continuing education of the Bar and assures its support.

Pursuant to this agreement, the Committee on Continuing Legal Education commenced to operate on February 1, 1948. The Committee consists of twelve representatives of the American Law Institute, eight of the American Bar Association and the presidents of both organizations. Of those chosen by the American Bar Association, four are selected by the Section of Legal Education and Admissions to the Bar, two by the Section of Bar Activities and two by the Junior Bar Conference.

The agreement classifies the responsibilities of the American Law Institute and American Bar Association.

The American Law Institute assumes responsibility for:

> (a) a national publication program of practical handbooks;
>
> (b) encouraging and assisting in the organization of state and local agencies to conduct post-law school education programs, and, where desired, to operate and administer institutes;
>
> (c) providing information to the Bar generally and particularly to state and local bar associations of the needs and proper organization and execution of post-law school legal education;
>
> (d) financial responsibility for developing and carrying out the program.

The American Bar Association assumes responsibility for:

> (a) furnishing to the American Law Institute all information in the possession of its Sections and Committees which might be of assistance in organizing and conducting the program;
>
> (b) the use of its public relations facilities in furtherance of the project;
>
> (c) action by the Board of Governors, Sections, Committees and the Junior Bar Conference to facilitate and expedite the setting up and carrying on of local organizations;
>
> (d) furnishing to the American Law Institute opportunity for appropriate reports to the Section of Legal Education and Admissions to the Bar and to the House of Delegates.

The Committee has made a truly impressive record. It has assisted in the promulgation and conduct of legal institutes at a basic, "how-to-do-it" level in forty-three states, in many of which the projects have now established themselves on a long-range basis. The Committee has published some twenty-five practical handbooks, more than 85,000 of which are now in use in all states and which have been universally acclaimed.

More recently, the Committee has embarked upon a project under which in a limited number of localities, principally under the aegis of law schools, seminars at a more advanced level will be conducted for lawyers desiring to probe more deeply into specialized subjects.

The Committee is now established as a permanent organization and is making a significant contribution to the betterment of the profession. It provides one effective answer to the question, "What is the organized Bar doing to help the lawyer?"

The results achieved to date by the Committee on Continuing Legal Education are most gratifying. Many Sections and Committees have co-operated in furnishing material and lecturers. This co-operation is most desirable and should be expanded. Each group has a recognized place in the all-important objective of providing an adequate program of continuing education and training for the practicing lawyer. Through the close and continuing co-operation of all participating agencies, we can expect even greater achievements in the years to come.

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The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territorial and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement of a member of the Association in good standing and are considered in each case by a Committee on Admissions of the appropriate state. If the applicant is a member of the Bar of the state or territory in which he resides or has his principal office, or is a member of a federal, state or territorial court of record of a state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of such states or territories. If, however, the applicant is not a member of the Bar of the state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of those states or territories or is referred to the Committee on Admissions for a state or territory in which the applicant formerly resided and to the Bar of which he was admitted. Upon the approval of an application by a majority of the proper Committee on Admissions, an applicant is deemed nominated for membership. All nominations made pursuant to these provisions are reported to the Board of Governors for election. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except that for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the following Sections: Bar Activities, Criminal Law, Judicial Administration, Legal Education and Admissions to the Bar, and the Junior Bar Conference. Dues for the Section of Administrative Law, the Section of Antitrust Law, the Section of Labor Relations Law and the Section of Patent, Trade-Mark and Copyright Law are $5.00 a year; dues for the Section of Taxation are $6.00 a year; dues for all other Sections are $3.00 a year.

Blank forms of proposal for membership may be obtained from the Association offices at 1140 North Dearborn Street, Chicago 10, Illinois.

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Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Takes Exception to Article on Trial Tactics

■ Concerning the article by Welcome D. Pierson in the October issue of the JOURNAL....

We do not ask jurors if they will follow the instructions of the court or tell them in advance we rely on their doing so. Our courts would not permit this.

Our successful trial attorneys do not guzzle Bourbon whiskey on the night before argument.

We would not be permitted to erase opponents' chalk before argument: probably nothing would be more prejudicial to our case than to try to do so.

Neither women nor men enter our jury box with notebooks.

No lawyer would be permitted to go outside the record to explain how he acquired a diamond ring—and no defense attorney worthy of his salt would complain that he could not afford rings or perhaps a Cadillac car.

I cannot believe that the advice given—at least on these points—is sound even in Oklahoma.

LOUIS E. WYMAN
Manchester, New Hampshire

Professor Cary Is "Unanswerable"

■ I have just got around to reading the October, 1953, issue, Volume 39, Number 10, of the AMERICAN BAR ASSOCIATION JOURNAL.

Thank you for publishing Professor William L. Cary's article entitled "A Strait Jacket for Sound Fiscal Policy". His statement of the case, as well as Griswold's, seems to me unanswerable.

I find it incredible that the American Bar Association or any official body thereof could give any support to or recommendation of what I will call Mr. Dresser's pet constitutional amendment. I call it Dresser's, although I know some others have sponsored it for I have received in the mails reams of propaganda attempting to gain support for it; and also because Mr. Dresser's pet is thoroughly characteristic of his personal views on most domestic political issues.

I suppose it is too much to hope that the American Bar Association will take active steps toward opposing the adoption of this constitutional amendment, although such action would seem to me to be appropriate action to be taken by lawyers, who are presumed to comprehend better than most the type of matter which belongs in the U. S. Constitution and the type of matter which should be left to legislation.

The country has had enough trouble with one bad amendment, promoted by a pressure group. The same kind of trouble may not be expected from Mr. Dresser's pet if adopted, but trouble enough and bad enough is to be contemplated if the misfortune of its adoption should be brought upon us by the efforts of his pressure group.

GEORGE HURLEY
Providence, Rhode Island

Lawyers and Social Security

■ I should like to add a footnote to Dean Larson's excellent article on "Social Security and Self-Employed Lawyers" which appeared in the November issue of the JOURNAL. Having in recent years served as counsel to the widows of three deceased lawyers, I was very much interested in the statement on social security presented by the then Senator Henry Cabot Lodge on the floor of the Senate on January 22, 1952. At the February, 1952, meeting of the Bar Association of my native State of New Hampshire, I read Senator Lodge's statement. As a result, a committee of that Association made a thorough study of the matter. The committee's report recommending both social security coverage and a tax deduction for retirement savings was overwhelmingly approved by the members of the New Hampshire Bar Association at their June, 1952, meeting. Senator Lodge's statement was as follows:

> Early in September of last year, I sent a letter to each listed lawyer in most of the larger cities of Massachusetts asking for the individual's views with regard to social-security coverage. Nine thousand letters were mailed. To date, I have received 1,669 replies. The reaction confirmed my feeling that the argument for excluding lawyers was illusory, for 1,481 declared themselves emphatically in favor of coverage, 160 were opposed and 28 had no opinion. In other words, the result showed that lawyers in Massachusetts favor social-security coverage almost 25 to 1. It should be mentioned that many of those who opposed coverage did so because they preferred a system of tax deductions for voluntary pension plans, while others said that they did not believe in any social-security program at all for anybody.
>
> The arguments, briefly, in favor of including lawyers can be summarized as follows:
>
> 1. An attorney at 40 years of age cannot count on reaching age 65 or later with sufficient savings to provide for his years of retirement, even though it is true that some self-employed lawyers do practice after 65 years of age.
>
> 2. Lawyers, as a class, are no better off financially than many other insured groups.

(Continued on page 163)

The Inventor in the Courts:

Confusion as a "Standard" for Invention

by **Logan R. Crouch** • of Jackson, Mississippi

■ "If the captain of a ship sails in waters he knows well, he can use this local knowledge and not give too much attention to the general rules of navigation. But, if he enters a sea he has never sailed before, he must use all of his knowledge of general navigation to make up for his lack of knowledge of specific conditions in that sea, if he wants to bring his ship safely into port." This metaphor from Mr. Crouch's letter submitting the following article to the *Journal* expresses what he tries to do in the following pages. He argues that lawyers and judges, particularly on the Supreme Court, do not understand the technical problems of patent law or the principles of mechanics underlying it. He suggests that courts should rely more heavily upon the law itself to make up for their lack of knowledge of the specific waters of mechanics about which they know little.

■ Many Americans laugh at the pretensions of the present regime in Russia, which lays claim to almost all of the great inventions of the era as the work of Russians. Certainly, at least these claims of the Russians show that in Russian opinion the inventor is entitled to a place of honor in modern society. Does the ordinary American citizen know that the ruling powers in the United States do not now hold this view? Does he know that during the last two decades the so-called "liberal" groups, who have taken over most of the government departments, have set up the dogmatic doctrine that anything that injures an inventor aids the "public", and, therefore, must be condoned, no matter how reprehensible it may be to moral ideals or ordinary law? Does he know that a so-called "liberal" Justice of the Supreme Court openly expressed his contempt for moral decency in connection with patent cases by speaking of it as "so-called" moral law?

No doubt many Americans smiled when they heard for the first time that a Russian had invented the telephone. All Americans had been told that the inventor was Alexander Graham Bell. But very few have been told how many times Bell had to defend his claims in court against both the charge that another was the real inventor and that no one had invented anything at all. Fewer still know how, after the failure of those who had tried to destroy him, so they could exploit his invention themselves, the Government of the United States took it upon itself to destroy Dr. Bell. It charged Dr. Bell with theft and fraud in securing his patent. Under these historic facts, it does not seem unreasonable for the Russians to claim the invention. Just as the private would-be exploiters failed, so the Government failed to disgrace Dr. Bell as a thief and a fake. Now, after three quarters of a century, no engineer or scientist of any standing would question that the telephone was a real invention or that Bell was the real inventor.

Congress has turned a deaf ear to the theorists who see harm to the "public interest" in anything which protects an inventor from the exploiters who wish to take all the profit of the inventor's labor for themselves. But in the courts and government bureaus and departments, a great deal of success has attended the efforts of ideologists.

The method is to form an endless number of makeshift regulations in order to hamper a patent owner in any effort to put his invention into use, permit others to use it, or to obtain a compensation from those who use it without his consent under the *assumption* that anything that hurts the patent owner necessarily helps the "public interest".

The spirit of pyschopathic hostility toward inventors which caused the disgraceful Bell episode has been adopted as an article of political faith by the intellectual group which forms the extreme "liberal" element of the "New Deal", and is represented by the "liberal" Justices of the Supreme Court. It was a part

of the political philosophy of the Tories in England during the first part of the reign of George III. It was held by the pro-Slavery members of the Court who conceived the doctrine of the *Dred Scott* case. But the genuinely liberal Justice Oliver Wendell Holmes refused to have any part of it.

The fanatic acceptance of it by the "liberals" is unexplained. But for over a decade, a judicial and anti-inventor witch hunt has been in full cry until no one can feel any assurance that any new machine, process or product, however mechanically or chemically different from what has been known before, will be considered to be an invention by the courts and, therefore, the subject for a valid patent.

A particular target of the ideological demagogueries are the rules under which the patent owner establishes the fact that the thing which his patent covers is a substantial improvement, a new thing, of the kind that Congress intended to protect when it provided that patents were to be issued for new things and new improvements. To protect his rights, a patent owner must sue those who use the invention without his consent. When someone pirates an invention and is sued, he almost always says that the thing the inventor claimed to have invented was only a small change in a thing already old, and therefore not the kind of new thing or improvement Congress intended to protect when it enacted the patent laws. This was said by those who tried to destroy the patents for the telegraph and the telephone, for example, as well as Edison's electric light. If the court should believe this is so, it would declare the patent invalid and the infringer could continue to use it.

Rules Were Definite Twenty Years Ago

Twenty years ago the rules that governed this question were fairly clear, definite and standardized. But under the ideological pressure the courts have replaced these standards by endless makeshift abstractions and sophistications, until the rules have been reduced to utter confusion. Finally the courts have become the prisoners of their own confusion—in the recent decision of *A & P Tea Company* v. *Super Market Equipment Company*, the Supreme Court has set up this very confusion and lack of standard as *its* standard to be used in deciding legal invention.[1]

There is no other living American jurist who is as much respected by those of both the liberal group and their opponents, not only in the legal profession, but in general, as Judge Learned Hand, who recently retired from the Court of Appeals for the Second Circuit after serving as a federal judge for over forty years. He is respected not only for his intellectual integrity and his open-mindedness, but also for his understanding of the technical foundation of the law. He served as judge in countless patent cases.

Shortly after his retirement, Judge Hand said, "The question is whether there is patentable invention [in the improvement]. That issue is as fugitive, impalpable, wayward and vague a phantom as exists in the whole paraphernalia of legal concepts. If there be an issue more troublesome or more apt for litigation than this, we are not aware of it."

A legal writer who shares the "liberal" dislike for patents, writing in the law publication of a very old and famous Eastern school, says that the present Supreme Court has made itself the guardian of the "public interest" in patent law by forcing the lower courts to rule a very large number of patents invalid because of the strict rules it has set up. If this is so, nothing can show better than the statement of Judge Hand that the Supreme Court in this self-appointed role is merely negative and destructive. But a mechanical and technical study of the decision in the *A & P* case may explain how that condition has arisen, and reveal how little the Supreme Court, with its present membership, may be qualified to pursue this self-imposed task.

Patent law is highly technical. But when any particular case is properly explained, there is nothing mystic or intangible about it. Indeed, as a matter of legal procedure, both invention and infringement are findings of fact and in a trial at law would be decided by the jury. The reason most cases are decided by judges is that most trials are held in equity. For this reason no intelligent person, whether housewife, mechanic or editor, should fear that the principles involved in a simple patent suit are beyond his grasp. If he cannot understand it, the fault is with the one who sets himself up to do the explaining. This analysis is an attempt to explain the simple, elemental principles of physics and mechanics involved, which the Supreme Court either disregarded or did not know were in existence, and to connect them to simple principles of law which anyone may understand.

Before taking up the merchandise handler, which was the subject of the patent in the *A & P* case, we may first consider the elemental rules that apply to the composition of *all* mechanical devices. Since the Supreme Court held that the Turnham device did not meet the requirements of a legal invention, we must analyze the Court's requirements to see whether they are in harmony with these elemental rules.

We may first turn to the explanation of the Supreme Court which says, "Courts should scrutinize combination patents with a care proportioned to the improbability of finding invention in an assembly of old elements." In plain words, this means that our Supreme Court does not believe a machine can be an invention if it is built up of old parts. Thus the man who built the first raft would have invented nothing because the logs he used were old. The man who first used a lever, which scientists tell us was one of the first machines ever invented, really invented nothing because the stick which formed the bar and the

1. Turnham patent.

rock or block which formed the fulcrum were both old.

So we may well ask if the Supreme Court in making its decision merely used catch phrases or if this represents sound mechanical thought.

One who knew nothing about music might think it reasonable to suppose that different tunes could not be formed by using the same notes. He might conclude that a copyright was invalid because a tune was made merely by rearranging the notes used in other melodies. But he would be laughed out of court because even children know that the series of full tones and half tones which form a musical scale can be rearranged into countless different melodies, each having a different harmonic effect and each creative in its own right.

Perhaps one who had no knowledge of chemistry might think it reasonable to conclude that different products could not be formed out of the same chemical elements merely by changing the manner in which the elements were united. But the science of chemistry accepts this as an established fact. For example, we drink water or use it to wash our hands. We may use hydrogen peroxide as a disinfectant or a brunette may use it as hair bleach and become a blonde. Water and hydrogen peroxide have different physical properties, yet chemists tell us both are made by the chemical union of oxygen and hydrogen. Even in the light of the present judicial witch hunt against patents, no one has suggested that a new chemical composition, having new physical properties, cannot be covered by a legal patent merely because the chemical elements which form it were known as parts of other compositions before.

Why should the courts and the legal profession be so sure that the principle that applies to the arts of music and chemistry does not also apply to the art of mechanics that they assume it without question?

Not only is the theory of the court in conflict with the elemental teaching of physics and mechanics, but this can be shown by a simple illustration.

We may think of an ordinary brick wall. We distinguished between tunes by the harmonic effect, and between water and hydrogen peroxide by physical properties, or physical capacities.

We build the brick wall by fastening the bricks together with mortar and placing one row or layer of brick over another. If we place the brick in each row directly over the brick below, each brick will serve two purposes. It will form a part of the enclosure formed by the wall and it will also serve to support that part of the wall over it. These purposes are mechanical results and are the equivalents of the chemical properties of the water and hydrogen peroxide. In patent law both the mechanical results and the physical properties are functions.

But even those who are not close observers must have noticed that in brick walls the bricks in one layer are never laid directly over the bricks in the layer below. The bricks are placed so each brick rests on the joining halves of two bricks below it and, in turn, supports halves of two bricks above it. Not only do the bricks in the wall perform the same two functions they would have performed had they been placed directly over each other, but they also perform a third function. They bind the wall together. By merely arranging the bricks differently, a new mechanical principle is in the wall. The first two functions are performed by each brick acting by itself. But the third function is a joint or composite one and we must examine at least three bricks to see it, because each brick supplies a part of it. In patent law the bricks in each layer laid over the brick below would be an aggregation and the bricks laid so that they interlocked with each other would be a combination. Just as the water and hydrogen peroxide, although made up of the same elements, are distinguished from each other by the different function, or physical property, so the different arrangement of the bricks is distinguished by the additional function.

LOGAN R. CROUCH

It is unusual for the *Journal* to publish an article by a layman, particularly when the subject is a highly technical one that most lawyers know little about. The soundness of Mr. Crouch's work is testified to by a member of the Patent Bar, to whom the editors of the *Journal* referred it, who praised it highly, saying it represented "sound thinking in line with guiding philosophical and legal principles accepted since the Act Against Monopolies in England in 1623".

The classifications of things as aggregation and combinations is a mechanical and physical fact of life. Whenever two or more component parts co-operate to produce one result, a combination is present. When the component parts produce no composite result because of their presence in a group, that group is an aggregation. The classification occurs not only in mechanical devices but in other things, among which are products and processes. The mechanical concept of the group of parts, forming a composite result as a combination, has been accepted by the courts as a legal standard for at least two hundred years.

While Justice Jackson rejects this mechanical concept as the legal guide in his opinion on the Turnham patent, not much space will be given

here to it, because even more important mechanical principles and concepts are also rejected or ignored.

Under some circumstances the mere proper grouping of elements sets up entirely new and surprising forces. As an example of this we may return to the raft.

Perhaps a tribe of prehistoric men lived at the mouth of a river where floating logs were frequent. Perhaps they floated on these logs or used them for travel or transportation in a very limited way. Perhaps, after much consideration, a chieftain of the tribe took two logs similar in size and shape and bound them rigidly together, forming the first raft. Perhaps, because the raft was highly useful, he received honor in the tribe.

If mental ancestors of the modern "liberal" intellectual sophisticates were present, they, no doubt, belittled the work of the chieftain and said that under no circumstances could merely putting two logs together be creative like drawing pictures on the walls of caves. No doubt they said anyone could have done it because anyone knew that logs would float.

In an earlier case,[2] Justice Jackson wrote a concurring opinion which aired his doubts whether merely uniting old elements in one device could be invention. In a manner that seems unduly flippant for a member of the Court, he asks how merely using two elements instead of one can be invention. In the *A.&P.* case, Justice Douglas writes a concurring opinion in which he speaks scornfully of simple "gadgets", not worthy of patents, and implies that the atomic bomb was a great invention. Perhaps courts, so far as possible, should leave mechanical theories to mechanics and engineers and theories on science to scientists. There is always the chance that what may appear a subtle mechanical theory to a jurist may be obvious to even an apprentice, or what may appear to be sound science to him may be foolish to even a freshman in science.

So to Justices Jackson and Douglas and others, we explain the parable of the raft of two logs by offering a mechanical analysis.

When the raft of two logs rested on the surface of the water, two natural forces were at work upon each log. The force of gravity acting upon each log held it down upon the water and its buoyancy, responding to the law of displaced liquids, held it up. When some force acted to overturn the raft, these two natural forces were brought into conflict, because either one log would have to rise against the law of gravity, or one would have to sink against the law of displaced liquids, before the raft could overturn. To the extent that the two forces acted against each other, an entirely new force, stability, was present in the raft.

For good or evil, great as the invention of the atomic bomb may have been, the general invention produced no new force; it only released forces already present in nature.

The chieftain may only have produced a "gadget" in the raft, but it still embodied a force which did not have even an incorporeal former existence.

Countless such forces are embodied in the mechanical devices that surround us. Such forces are more fantastic than the fairies and genii who served favored mortals in the tales of the *Arabian Nights*. Yet they are real. They serve by the dozen in every American home, but, to legal sophisticates, the devices which embody them are only "gadgets".

Before taking up the detailed study of the device shown in the Turnham patent, it is necessary to give particular thought to another classification of mechanical devices. In addition to being classed as aggregations and combinations, they are also classified as machines and structures. In the past, courts have given a good deal of attention to classifying devices as aggregations or combinations, but very little to classifying them as machines or structures, because, as the law has been understood, this was not important. But if the latest Supreme Court theory that invention is unlikely to be found in an assembly of old elements is accepted, the basic mechanical concept of machines will be destroyed. In the science of mechanical engineering and mechanical physics, it has long been accepted that machines are formed by bringing two or more parts, old or new, into mechanical union. By mechanical union or unity it is meant that at least one part must be capable of controlled movement in relation to the other part or parts, and the device so formed must be capable of transforming, not merely directing, force. The classic example of a structure is a bridge which can only direct force. The classic example of a simple machine is a bar and fulcrum to form a lever assembly. The bar is capable of controlled movement in relation to the block or fulcrum, and the movement results in a smaller force, moving a longer distance at the long end of the bar, being transformed into a greater force moving a shorter distance at its shorter end.

In pure mechanical art, the lever, the weight and inclined plane, even a wheel on an axle, which can only transform force into controlled motion, are all elemental machines. However, in *applied art*, generally, *the objective is to arrange the parts so that the transforming of the force will perform some useful result or function, or cause it to occur.* Also, in applied art, the controlled movement of the part might sometimes be called a controlled operation more realistically than a movement. In applied art, such elemental machines as the wheel or lever are sometimes spoken of as mechanical powers or in similar terms because they seldom transform the force directly into useful results themselves, but serve as parts of machines which do.

If machines are formed by the mechanical union of parts, old or new, it follows that the basic identity of any machine must be in

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2. The *Mercoid* Case, 320 U.S. 661.

Administrative Law and the Sixth Amendment: "Malaise in the Administrative Scheme"

by Bernard Schwartz • Professor of Law at New York University

■ Professor Schwartz, who is Director of the Institute of Comparative Law at New York University, calls attention to *United States* v. *Spector*, decided by the Supreme Court almost three years ago, which has received little attention from the profession. The dissenting opinion of Mr. Justice Jackson called attention to the grave problem raised by the case, which Professor Schwartz spells out at length here.

■ In his dissent in an important case, Mr. Justice Jackson recently referred to what he termed "malaise in the administrative scheme".[1] As symptomatic as anything of this state of affairs is the situation pointed out by the same learned Justice in his dissent in *United States* v. *Spector*,[2] one of the important cases decided during the 1951 term of the Supreme Court, which has thus far not received the attention which it deserves from the legal profession. The *Spector* case involved an indictment for violation of that provision of the Internal Security Act which provides that an alien against whom an order of deportation is outstanding shall be guilty of a felony if he shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure. The question raised by Justice Jackson was whether, in such a proceeding for violation of this provision, the Act was not constitutionally defective because of its failure to permit the court to pass on the validity of the deportation order.

An administrative order, such as a deportation order, is not made by procedures that are constitutional for judgment of crime. Indeed, administrative determinations of liability to deportation have been sustained as constitutional only by considering them to be exclusively civil in nature, with no criminal consequences or connotations. The adjudication that an alien is subject to deportation is not made either by a jury trial or a court decision. The finding that the alien is guilty of conduct subjecting him to deportation does not require proof beyond reasonable doubt but may be made on mere preponderance of evidence. And, on judicial review, the court considers only the question whether the deportation order is supported by substantial evidence on the record as a whole. Yet, under the act involved in the instant case, a deportation order is made to carry potential criminal consequences.

It is in this that is to be found the difficulty which inheres in the instant statutory scheme, said Justice Jackson. Having dispensed with important constitutional safeguards in obtaining an administrative adjudication that the alien is guilty of conduct making him deportable on the ground that it is only a civil proceeding, the Government seeks to turn around and use the result as a conclusive determination of that fact in a criminal proceeding. This, asserts Justice Jackson, it cannot do.

The act involved in the *Spector* case creates a crime based on unlawful residence in the United States. Yet it does not permit the court which tries the alien for this crime to pass on the illegality of his presence, for no inquiry into the correctness or validity of the deportation order is permitted in the criminal proceeding. "The subtlety of the present Act", declares Justice Jackson's opinion, "consists of severing the issue of unlawful presence for administrative determination which then becomes conclusive upon the criminal trial court. We must not forget that, while the alien is not constitutionally protected against deportation by administrative process, he stands on an equal constitutional footing with the citizen when he is charged with crime. If Congress can subdivide a charge of crime against an alien and avoid jury trial by submitting the vital and controversial

1. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 482 (1952).
2. 343 U.S. 169, 174 (1952).

part of it to administrative decision, it can do so in the case of a citizen. And if vital elements of a crime can be established in the manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective safeguards of all men's freedom."[3]

Implicit in the dissent of Justice Jackson, which has just been discussed, is the view that, in a criminal proceeding which is based upon an administrative order, there must be full review of the validity of that order. Otherwise, it can be argued, the accused is not being given the full trial to which he is entitled under the Sixth Amendment to the Federal Constitution. How can it be said, in such a case, that "the right to a speedy and public trial by an impartial jury" guaranteed by the constitutional provision is, in fact, safeguarded, when neither court nor jury can consider the legality of the administrative order upon which the entire proceeding is based?

The question raised by Justice Jackson in the *Spector* case—that of whether a court in a criminal proceeding may review an administrative order which serves as the basis for the imposition of the criminal penalty—thus involves the fundamental issue of the relationship of administrative law to the safeguards imposed by the Sixth Amendment. The majority of the Court in the *Spector* case did not see fit to deal with that question on the ground that it was neither raised by the alien defendant nor briefed nor argued before the Court. The judicial squeamishness[4] in this respect should not, however, bar consideration of that question by students of administrative law, because of its implications for the efficacy of the guarantees of the Sixth Amendment.

Estep v. *United States* Is Convenient Starting Point

Estep v. *United States*,[5] decided by the Supreme Court in 1946, may serve as a convenient starting point for a brief discussion of the question raised in the *Spector* case. That case, like *Spector*, arose out of a criminal prosecution, which was grounded upon the order of an administrative agency. In *Estep*, petitioner was indicted for violation of the Selective Training and Service Act of 1940 for willfully failing and refusing to submit to induction, as he had been ordered to do by his local board. He sought to defend on the ground that the board's action with respect to him was invalid because he was a minister of religion, entitled to exemption from service under the Act. The district court rejected these defenses; the Supreme Court reversed.

According to Mr. Justice Douglas, who delivered the opinion of the Court, "We cannot read § 11 as requiring the courts to inflict punishment on registrants for violating whatever orders the local boards might issue. We cannot believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction."[6] It is true that the Act conferring competence on the district courts to try one charged with its violation was silent with regard to the defenses, if any, which might be interposed. The fact that the statute made no provision for review by the courts of the actions of the local boards was not, however, decisive. "For the silence of Congress as to judicial review is not necessarily to be construed as a denial of the power of the federal courts to grant relief in the exercise of the general jurisdiction which Congress has conferred upon them."[7]

In the instant case, to hold that the validity of the administrative order for whose violation petitioner had been indicted could not be reviewed in the criminal proceeding would be to deny him the opportunity to prove the nonexistence of an essential element of the crime with which he was charged. "We cannot readily infer", asserts the Court's opinion on this point, "that Congress departed so far from the traditional concepts of a fair trial . . . as to provide that a citizen of this country should go to jail for not obeying the unlawful order of an administrative agency. We are loath to believe that Congress reduced criminal trials under the Act to proceedings so barren of the customary safeguards which the law has designed for the protection of the accused."[8]

In a case like the *Estep* case, it seems clear that, if the administrative order for whose violation petitioner had been indicted was invalid, then petitioner had not actually committed any crime. "Before a person may be punished for violating an administrative order due process of law requires that the order be within the authority of the administrative agency and that it not be issued in such a way as to deprive the person of his constitutional rights."[9] A contrary result would be wholly inconsistent with the basic principles upon which our criminal law is grounded. "To sustain the convictions of the two petitioners in these cases", declared the concurring opinion of Mr. Justice Murphy in the *Estep* case, "would require adherence to the proposition that a person may be criminally punished without ever being accorded the opportunity to prove that the prosecution is based upon an invalid administrative order."[10]

If the validity of the administrative order is an essential element of the crime in a case like *Estep*, it would appear that the defendant is entitled to a full trial *de novo* upon that issue. If the court that tries his criminal case may not make a complete inquiry into the legality of the administrative order, which is a cardinal component of the crime, can it be said that the accused is really receiving the protection of a full trial guaranteed him by the Sixth Amendment?

3. *Id.* at 177.
4. The term used *id.* at 180.
5. 327 U.S. 114 (1946).
6. *Id.* at 121.
7. *Id.* at 120.
8. *Id.* at 122.
9. Murphy, J., concurring, *id.* at 126.
10. *Id.* at 125.

Cox v. *United States*[11] dealt with the question of the scope of review of an administrative order in an *Estep*-type proceeding. Under it, it would seem that the scope of such review is no broader—if anything, it is even narrower—than that available in the normal proceeding for direct review of administrative action. The fact pattern in the *Cox* case was similar to that in *Estep*. It, too, involved an indictment for violating the Selective Training and Service Act. The defense, as in *Estep*, was that the local board's classification of petitioner was invalid because he was entitled to exemption as a minister of religion. Petitioner claimed that he was entitled to have the jury pass upon the validity of his classification. This claim was categorically rejected by the majority of the Court. "Whether there was 'no basis in fact' for the classification", reads the opinion of Mr. Justice Reed, "is not a question to be determined by the jury on an independent consideration of the evidence. The concept of a jury passing independently upon an issue previously determined by an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order."[12]

With this part of the Court's decision, few administrative lawyers will disagree. Even if one feels that, in a criminal proceeding based upon an administrative order, the accused is entitled to full review of the validity of that order, that does not necessarily mean that the question of validity is one to be determined by the jury. It is a question which is more legal than factual in nature and, as such, is one to be resolved by the court itself. The accused is fully protected by having the issue of validity of the administrative order submitted to the trial judge for decision.

Yet, even insofar as review by the court itself is concerned, the Court in the *Cox* case indicates that the scope of review is a very narrow one. As it was expressed by Justice Reed, "Perhaps a court . . . would reach a different result from the evidence but as the determination of classification is for selective service, its order is reviewable 'only if there is no basis in fact for the classification'. . . . Consequently when a court finds a basis in the file for the board's action that action is conclusive. The question of the preponderance of evidence is not for trial anew. It is not relevant to the issue of guilt of the accused for disobedience of orders."[13]

With all respect, it is difficult to see why the rightness, rather than the reasonableness, of the administrative action at issue in this case was not relevant to the question of guilt. If the board's classification was invalid, could the accused be deemed guilty of a crime? Is it rational to assume that Congress, in making it a criminal offense to violate orders under the Selective Training and Service Act, intended violation of an order which was itself invalid to lead to the imposition of the criminal penalty? Certainly, to use the language of two of the dissenting Justices in the *Cox* case, "care must be taken to preclude the review of the classification by standards which allow the judge to do little more than give automatic approval to the draft board's action. Otherwise the right to prove the invalidity of the classification is drained of much of its substance and the trial becomes a mere formality."[14]

Scope of Judicial Inquiry Is Most Restricted

It should be recognized, however, that, under the Court's decision in the *Cox* case, even where the validity of an administrative order upon which a criminal proceeding is grounded is open to challenge in that proceeding, the scope of judicial inquiry into the question of validity is a most restricted one. It goes no further than to determine whether, upon the administrative record, there is an evidentiary basis to sustain the order. If there is such basis, then the sole question left for determination before the criminal penalty is imposed is that of whether the accused willfully violated the particular order. It is thus possible for the accused to be found guilty of a crime, even though the preponderance of the evidence is against the validity of the administrative order upon which the proceeding is based, where there is evidentiary support for the order. According to Justice Reed in the *Cox* case, as we have seen,[15] the question of preponderance of the evidence is not relevant to the issue of guilt of the accused. One wonders whether the draftsmen of the Sixth Amendment would have taken quite so cavalier a view.

Under the *Estep* and *Cox* cases, which have been discussed, there is at least some inquiry, though a most limited one, by the criminal court into the validity of the administrative order upon which the proceeding is based. But those cases apply only where, as under the selective service legislation, there is no statu-

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11. 332 U.S. 442 (1947).
12. *Id.* at 452.
13. *Id.* at 453.
14. *Id.* at 457, per Murphy and Rutledge, JJ.
15. *Supra*, note 13.

tory provision for the direct judicial review of administrative action. In the federal field today, statutes creating administrative agencies generally provide methods by which their determinations may be judicially reviewed.[16] In such cases, where a special review procedure is provided by the legislature, may the validity of an order issued by the agency concerned be challenged by the accused in a criminal proceeding charging him with violation of the order?

The Supreme Court has answered this question with a categorical negative in *Yakus* v. *United States*.[17] That case arose out of indictments charging violations of the Emergency Price Control Act of 1942 by the willful sale of meat above the maximum prices prescribed by the relevant Maximum Price Regulations promulgated by the Office of Price Administration. Under the Act, those aggrieved by price regulations could, within thirty days, seek review in the Emergency Court of Appeals, and the jurisdiction of that court to determine the validity of such regulations was declared to be exclusive. The express provision in the statute of a method of review and its designation by the Congress as exclusive were enough, said the Court in the *Yakus* case, to deprive the district court of power to consider the validity of the administrative regulation as a defense to a criminal prosecution for its violation.

In the view of Mr. Chief Justice Stone, who delivered the opinion of the Court, there was no constitutional requirement that the validity of the administrative regulation be tested in the criminal proceeding itself. "We are pointed to no principle of law or provision of the Constitution", he asserted, "which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity, or which precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations."[18]

To the majority of the *Yakus* Court, the splitting of the trial for violations of the O.P.A. regulations did not involve any denial of the rights guaranteed by the Sixth Amendment. Congress, said the Chief Justice, could make criminal the violation of a regulation. "The indictment charged a violation of the regulation in the district of trial, and the question whether petitioners had committed the crime thus charged in the indictment and defined by Congress, namely whether they had violated the statute by willful disobedience of a price regulation promulgated by the Administrator, was properly submitted to the jury."[19] What the Court appears to overlook, however is the fact that the validity of the regulation is an essential element of the crime with which the accused were charged. And, if that is true, does not the Sixth Amendment guarantee them a full trial of that issue in the criminal proceeding?

To Mr. Justice Rutledge, who dissented vigorously in the *Yakus* case, the crux of the case was the compatibility of the decision of the majority of the Court with the constitutional provisions safeguarding the right of criminal defendants to a full and fair trial. "By these provisions," his dissenting opinion declared, "the purpose is hardly to be supposed to authorize splitting up a criminal trial into separate segments, with some of the issues essential to guilt triable before one court in the state and district where the crime was committed and others, equally essential, triable in another court in a highly summary civil proceeding held elsewhere, or to dispense with trial on them because that proceeding has not been followed. If the validity of the order . . . has any substantial relationship to the petitioners' guilt, and it cannot be denied that it has, the short effect of the procedure is to chop up their trial into two separate, successive and distinct parts or proceedings, in each of which only some of the issues determinative of guilt can be tried, the two being connected only by the thread of finality which runs from the decision of the first into the second."[20]

The implications of *Yakus* are far-reaching. In effect, under it, the validity of an administrative order, upon which a criminal proceeding is based, cannot be considered in that proceeding if a method of direct review is provided by statute. The *Yakus* case thus approves, for the trial of crimes, a procedure which, in Justice Rutledge's phrase,[21] dispenses with trial of a material issue and splits the trial into disjointed segments, one of which is summary and civil, the other but a remnant of the ancient criminal proceeding.

It is most regrettable that the *Yakus* case has not attracted the widespread attention and concern among the legal profession which it deserves. Its holding tends to place our administrative law beyond the reach of the Sixth Amendment. Unlike all other criminals, one whose crime results from the violation of an administrative order can be convicted on what amounts to a trial in two parts or, in the alternative, on a trial which shuts out what may be the most important of the issues material to his guilt. It is true that the *Yakus* principle precludes all inquiry at the criminal trial into the validity of the administrative order only if the legislature has provided a special procedure for direct judicial review of the order. But, in the federal field at least, as has been indicated, such statutory review procedures are provided for in the large majority of cases. In the absence of statutory review provisions, the validity of the

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16. *Report of the Attorney General's Committee on Administrative Procedure* 82 (1941).
17. 321 U.S. 414 (1944).
18. *Id.* at 444.
19. *Id.* at 447.
20. *Id.* at 479.
21. *Id.* at 489.

Access to Justice:

The True Significance of Legal Aid

by William T. Gossett • Vice President and General Counsel of the Ford Motor Company

■ Mr. Gossett's remarks at the Legal Aid-Lawyer Referral Service Luncheon during the last Annual Meeting in Boston received wide acclaim for their simple statement of the fundamental significance of legal aid in our system of justice. He pointed out that legal aid is not charity, but a means of insuring that all citizens will have access to legal process, a basic ingredient of justice. The address is printed here in full.

■ If there is any doubt among us today that the improvement and extension of legal aid is as important as any other single objective of the American Bar Association, that doubt should be dispelled by the legal history of this city.

Life in Boston in 1770, we are told, was a concentration of the kinds of things that beset us today. It was a time of external pressures, of internal stress and of tensions between the inhabitants and the British garrison. A cold war was in progress, and a hot war was in prospect. An ideological conflict on the very nature of freedom was raging. An epidemic of suspicions and recriminations threatened relationships among the townspeople.

Finally, when a group of British soldiers fired on a crowd of inhabitants who molested them, the real political morality of our founding fathers was tested before the Republic itself was born. There was a great outcry at the killing of five Bostonians, and it looked as if the fate of the soldiers was to be decided summarily by an outraged populace rather than by the deliberate processes of the law.

But a courageous Boston lawyer risked his fortune and his future to defend the soldiers before an American jury. He was not an obscure Tory barrister to whom the British cause was always sacred; he was John Adams; and he devoted a year of his life to the case.

What motivated Adams was a principle that lies at the very foundations of the law in a free society. That principle is the simple truth that justice may be called justice only if it is denied to no man, however unpopular his cause, however reduced his circumstances and however heinous the charges against him.

But like all simple truths, it is one that can be easily forgotten. And if it ever is forgotten, I put it to you bluntly that the blame will lie with the legal profession itself. We are here today because we recognize a responsibility to extend the benefit of our laws and legal institutions to all our people; because we are aware of the manifold economic and social factors in today's world that make legal aid an inescapable charge on our profession.

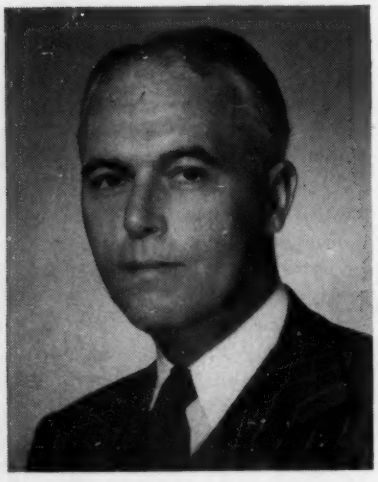
But we cannot afford to stop there. The legal profession in this country needs to look anew at its basic role to see whether it might not be losing sight of the forest for the trees.

Many Are Apathetic About Legal Aid

I have never met a lawyer who voiced outright opposition to the idea of legal aid. But the great majority of our colleagues at the Bar are hopelessly apathetic about this whole movement. Many of us think of legal aid as merely another form of charity, a kind of generous dispensation from the Bar to some troubled unfortunates. We fail to realize, it seems to me, that legal aid is much more than a form of charity; that it stands as both a symbol and an instrument of the vitality of our profession.

I want to suggest to you today that only by widening our horizons can we make a proper appraisal of the true significance of legal aid. I think all of us need to go deeper than the necessity for legal aid in terms of individual cases at any given time. Indeed, we ought to go right back to the foundations of the law itself and take a fresh look at that to which we are devoting our professional lives.

Friedrich von Savigny, who founded the historical school of jurispru-



William T. Gossett has been with the Ford Motor Company since 1947. A native of Texas, he practiced law in New York City from 1929 to 1947, working mostly in the fields of corporate finance and antitrust law.

dence, constructed a convenient image. To him, the law was "the rule whereby the invisible border line is fixed within which the being and the activity of each individual obtains a secure and free space".

Now it is the business of the legislature to set the dimensions of that "secure and free space", and I take it to be the purpose of the democratic experiment constantly to expand it, to make it more free and more secure. It is the duty of the courts to preserve the boundaries that already exist. But it is up to the legal profession to make access to that "secure and free space" as broad and inclusive as possible.

We are quick to sense grave danger when our legislatures or courts seem to lose sight of their purposes. But that third element—universal access to justice—is an element that has fewer automatic safeguards than have our legislative and judicial systems. And so if we neglect it, the dangers are multiplied many fold.

Legal aid in these terms seems to me illuminated by the long, slow processes of history. They have given us some valuable illustrations about access to justice.

It is not necessary to rely upon the unhappy fate of those societies that collapsed under the weight of their own excesses. In our own lifetime, we have seen this happen. Nazi Germany and Fascist Italy have brought up the dishevelled rear of a long, limping parade of those who saw the law, as Hobbes did, "as the speech of him who by right commands some thing to be done or omitted". Those governments were not interested in a "secure and free space" for any man.

I want to remind you today of some more promising societies; societies that prized their laws, but nevertheless failed. Among these we are apt to find many more exact parallels to our situation today than in the ill-fated totalitarian regimes.

Consider, for example, ancient Greece. No people in all the history of human affairs were more devoted to the ideal of liberty, and none has been more intellectually concerned with the law. But while gifted men devoted their lives to philosophizing about the nature of justice and the law in that society, whole segments of the population were denied admission to its precincts.

That Greek society withered and died, close to the top of its prime. It would be fatuous oversimplification to attribute its fall to any single factor; certainly it could not be laid to a lack of respect for the law. The fact remains that one of the basic infirmities of that civilization was that access to justice was not available to all. It requires no great effort to imagine the attitude of a people toward so inequitable a system.

The proposition may be as simple and direct as this: A lawful society has less to fear from sudden contempt for the law than from gradual restrictions upon access to the processes of the law—restrictions under which the law is available, not to all of the people, but only to some of the people.

The lesson of ancient Greece is not isolated in history. The American Revolution had its beginnings when British justice became selective—available to the British at home but denied to the British abroad. And yet, Lord North's Britain was not a nation that was contemptuous of the law. It lost the colonies because it denied to them control over that "secure and free space" which Savigny called the law.

The code of the "secure and free space" is the charge of our profession. It is the essence of legal aid. Without universal access by all of the people, the life of the law would be meaningless, respect for the law would vanish and the growth of the law would cease.

It was for this principle that John Adams took his stand nearly two centuries ago. In our much more intricate and in many ways more vulnerable society, the American Bar never should forget that universal access to the processes of the law is the basic concept on which legal aid rests.

Hotel Arrangements for the 1954 Annual Meeting

Detailed announcement concerning hotel arrangements for the Annual Meeting of the Association, which will be held in Chicago, August 15-20, 1954, appears at page 54 of the January issue of the JOURNAL.

The Federal Trade Commission:

A Revaluation of Its Responsibilities

by Edward F. Howrey • Chairman of the Federal Trade Commission

■ When the new Chairman of the Federal Trade Commission addressed the University of Michigan's Institute on Federal Antitrust Laws last summer, he revealed a substantial change in the thinking of the Commission on the wide area of law and economics under its jurisdiction. Mr. Howrey's address is published here in the belief that all lawyers, whether they handle antitrust work or not, want to be informed about developments in that vital field.

■ The Federal Trade Commission is, or at least should be, one of the most important and vital agencies in Washington. It exercises a jurisdiction which staggers the imagination. It supervises the competitive practices of our vast multibillion dollar economy. It is charged with the basic duty of preserving our private competitive system.

The antitrust laws are deeply embedded in our business philosophy. They were enacted many years ago as the Magna Charta of economic freedom for an America emerging from an agricultural economy.

As Chairman of the Commission I will do my best to see that they are administered vigorously, fairly and intelligently, with due regard for all segments of our economy, including the consumer, the small businessman, the medium size and the large.

The purpose of this statement is to suggest certain lines along which the Commission's efforts may immediately be directed toward realization of this over-all objective.

The time that I have been in office is too brief to permit revaluation of all phases of the Commission's responsibilities. Such a program will be filled out in the months ahead.

Various Statutes Attempt To Regulate Trade

The Sherman Act of 1890 is a broad statute setting up general standards which prohibit unreasonable restraints of trade and attempts to monopolize.

The Federal Trade Commission Act of 1914, as amended, is a general statute which prohibits "unfair methods of competition" and "unfair or deceptive acts or practices". This statute supplements the Sherman Act.

The Clayton Act of 1914, as amended, is a special statute which prohibits particularized practices when specified effects upon competition are proved, such as price and service discriminations, exclusive dealing and tying contracts, acquisitions of competitors and interlocking directorates. This statute also supplements the Sherman Act.

There is no doubt that these statutes were intended to be *in pari materia*. No presumption or inference is necessary to disclose the congressional intention of treating them as interrelated expressions of the national antitrust policy.

In recent years, however, enforcement policies have grown up which seem to magnify conflicts and inconsistencies in these basic statutes.

Policy choices have been made, for example, between "hard" and "soft" competition. At other times these antithetical positions have received concurrent and simultaneous advocacy in separate counts of the same complaint.

There may be some inconsistency between legislative policies which enforce price competition (Sherman Act and Federal Trade Commission Act) and those which regulate price discrimination (Robinson - Patman Act), but this inconsistency has been accentuated and magnified out of all proportion by the application of unrealistic legalisms.

As Congress thought of it, the promotion of price competition and the prohibition of unfair and discriminatory pricing practices constituted a complementary dual program of fostering competition in the public interest.

The gearing of the privilege to compete with the obligation to compete fairly, is not necessarily incon-

sistent except as made so by strained statutory interpretation.

Congressional Purpose in Creating the Federal Trade Commission

In creating the Federal Trade Commission, Congress had two principal ideas in mind: first, to create a "body of experts" competent to deal with complex competitive practices "by reason of information, experience and careful study of business and economic conditions"; and second, to authorize this body of experts to deal with unfair competitive methods in their incipient stages.

The action was to be prophylactic; the purpose was prevention of diseased business conditions, rather than cure.

Critics of the Commission have maintained that it is not the body of experts Congress intended; that it has became a prosecuting agency employing laborious procedures and rigid per se interpretations without regard to the relationship of law, business economics and public policy; that its staff consists of a small coterie of rigid-minded men dedicated to the expansion of the Commission's jurisdiction by means of strained interpretations and "test" cases.

Supporters of the Commission, on the other hand, have maintained that a per se philosophy and "test" cases are necessary in order to deal with new, unforeseen and expanding unfair methods of competition created by a growing and dynamic economy; that the Commission would be unable to stop unfair practices, either in their incipiency or in their fruition, if it must employ the rule of reason in all cases or be limited to those unyielding categories of practices which had already been litigated or which were in violation of common law.

It would take a bold and adventuresome spirit to attempt to resolve these differences of opinion in one short article.

I do suggest, however, that the *expertise* which the Commission is is supposed to exercise plows barren ground if it is bound by absolute or per se rules; that it cannot acquire a special knowledge of competitive conditions and effects unless it examines all relevant economic factors, unless it tests public interest and competitive injury by such comparative facts as business rivalry, economic usefulness, degree of competition, degree of market control, degree of vertical integration, customer freedom of choice of goods and services, opportunities for small competitors to engage in business, costs, prices and profits.

Mr. Justice Frankfurter in the *Standard Oil of California* case suggested that standards of proof of this type might be practicable for the Federal Trade Commission but were ill suited for ascertainment by courts which lacked skilled economic assistance.

The inference to be drawn from this comment, and the more recent *Motion Picture Advertising* case, is that the Federal Trade Commission can and should sift and appraise all relevant economic data. In the *Motion Picture* case the Supreme Court said: "The precise impact of a particular practice on the trade is for the Commission, not the courts, to decide."

For emphasis and appreciation of the proper concept of administrative law and of the true function of the Federal Trade Commission, we are indebted to the dissenting opinion of Mr. Justice Jackson in the case of *Federal Trade Commission* v. *Ruberoid Company*. Let us examine his analysis.

Congress was conscious of the "convenient vagueness" of the term "unfair methods of competition" in the F.T.C. Act and similar phrases in the Clayton Act. These acts, like other regulatory measures, sketched a general outline which contemplated clarification and completion by the Federal Trade Commission and other administrative agencies before court review.

The importance that policy and *expertise* were expected to play in reducing the Clayton Act to "guiding yardsticks", for example, is evidenced by the fact that authority to enforce it was dispersed among several administrative agencies dealing with special types of commerce. The act vested enforcement in the Interstate Commerce Commission where applicable to railroads and common carriers; in the Federal Communications Commission as to wire and radio communications; Civil Aeronautics Board as to air carriers; Federal Reserve Board as to banks; and the Federal Trade Commission as to all other types of commerce.

The rise of administrative agencies has been the most significant legal trend of the last century. "They have become a veritable fourth branch of government." Courts and commentators "have differed in assigning a place to these seemingly necessary bodies in our constitutional system. Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required. . . . The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed."

Where a statute is complete in policy (such as a revenue act) and ready to be executed as law, Congress yields enforcement to a wholly executive agency. Where the law is not clear of policy elements, its enforcement is placed in the hands of an independent administrative tribunal. If the tribunal to which such discretion is delegated does nothing but promulgate per se doctrines the rationale for placing it beyond executive control disappears.

As Mr. Justice Jackson said, ". . . if the scheme of regulating complicated enterprises through unfinished legislation is to be just and effective, we must insist that the legislative function be performed and exhausted by the administrative body before the case is passed on to the courts."

This is the duality of responsibility imposed by Congress on the Federal Trade Commission and the courts—that is, ascertainment by the Commission of competitive effects and review by the courts.

Standards of Proof Should Be Explored

As an important first step in this direction the Commission should revitalize its Bureau of Industrial Economics in order to provide for greater coalescence of legal and economic concepts of competition and monopoly. Standards of proof for measuring injury to competition should be carefully explored.

Almost every antitrust case presents economic as well as legal questions. In important cases the Commission's economists, guided by legal principles outlined by lawyers in charge of the case, should take part in the field investigation and furnish an economic report to the Commission prior to complaint.

Economics can properly be brought to bear on antimonopoly cases at four successive levels:

1. Initiation of cases. Economic criteria are relevant as to whether or not particular complaints should be investigated, the relative importance to be attributed to different cases, the amount of business affected, the seriousness of the economic impact of the alleged violation, the likelihood that what can be done about it will be effective.

2. Development of a theory of the case. Complex cases should be made to depend upon an acceptable economic theory as well as upon a valid legal theory. This necessarily raises a question as to the type of remedy that is desired and the economic consequences of such remedy. Questions of this type cannot adequately be covered by legal analysis alone.

3. Investigation. Restraint of trade and Clayton Act cases often require the development of statistical, accounting and marketing information. Such analyses can contribute to the planning of the investigation as well as to its actual conduct.

4. Decision. Economic analysis may be needed to evaluate the facts. Such analysis may be relevant at either or both of two stages—(1) in considering whether or not a complaint should issue and, if so, on what theory; and (2) after trial, in formulating the findings and determining the scope of the order.

The economic work of the Commission has not been adapted to the requirements of the Administrative Procedure Act. After trial is completed, neither the Hearing Examiner nor the Commission can ask for economic help in cases where the Bureau of Industrial Economics has participated in the development of the prosecution—the Administrative Procedure Act bars the furnishing of such advice.

This serious defect should be remedied by attaching economic advisers directly to the Commission, and possibly to the Hearing Examiners, to perform economic functions in the same manner as the General Counsel performs legal functions.

Yardsticks Are Needed for Robinson-Patman Cases

There is a particular need to formulate guiding yardsticks in matters arising under the Robinson-Patman Act.

Much discussion has taken place as to the relative merits and demerits of that Act. Small business groups, primarily retailers and wholesalers, strongly support it. Recently they have formed a committee called the "Committee for the Preservation of the Robinson-Patman Act".

On the other hand, at the American Bar Association meeting in San Francisco in 1952, several speakers said "no" to the proposition, "The Robinson-Patman Act—Is it in the public interest?"

For my own part I believe in its philosophy and am obligated to enforce it. Enforcement by an administrative agency means, or should mean, making every attempt to obtain compliance, first voluntary and then by order.

I long have thought that one of the main reasons for failure to obtain general compliance with the

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Robinson-Patman Act, is the mystery and ignorance (both in industry and government) which surround distribution costs.

While savings in costs constitute the primary justification for price differentials under the Act, there has been little advancement in the field of distribution cost accounting during the seventeen years it has been on the books. Manufacturing cost determination has been reasonably well understood and recognized for many years, but this has not been true in the distribution field.

In Robinson-Patman Act cases it has been very difficult, if not impossible, to determine precisely what cost savings are allowable and how they may be proved. General accounting analyses made for management in the regular course of business seem to be unsuitable for the purpose of supporting price differentials under the act.

The few distribution cost studies that have been developed have been very expensive and have involved detailed functional analyses of the sellers' entire business. Even then the conflicts betwen respondent's accountants and Commission accountants with reference to theory, allocations, procedures and methods have

prevented any reasonable evaluation of the actual savings in serving different customers.

I therefore intend to recommend the establishment of an advisory committee on cost justification consisting of accountants, economists and lawyers representing all viewpoints.

This committee should be instructed to ascertain whether it is feasible for the Commission to develop standards of proof and procedures for costing which can be adopted by the Commission as guides to business enterprises desirous of complying with the statute.

If standard methods and procedures can be developed, then distribution cost accounting could be built into the seller's formal books of account. This would permit business firms to keep their costs in a form which would enable them to compute more readily the distribution costs applicable to specific products, to specific classes of transactions, or to specific classes of customers.

At the present time most companies do not undertake any such prior systematic analysis, but develop their analyses only when they face an actual Federal Trade Commission complaint.

Although it is recognized that no feasible cost-accounting system can give instantaneous Robinson-Patman Act answers, there is no necessary conflict between better costs for Commission purposes and more useful costs for management.

Businessmen Desire the Advice of an Administrative Body

Turning to another phase of the Commission's responsibilities, you will recall Woodrow Wilson said that businessmen "desire something more than that the menace of legal process be made explicit and intelligible; they desire the advice, the definite guidance and information which can be supplied by an administrative body".

In an effort to carry out this original intent, I propose to recommend the establishment of a Bureau of Consultation within the Commission.

The primary purpose of such a Bureau would be threefold: (1) to act in a co-operative and consultative capacity to business, particularly small business; (2) to give informal oral advice on all kinds of matters involving the laws administered by the Commission; and (3) to seek voluntary compliance with such laws by means of conferences, informal hearings and other types of informal procedures.

One of the divisions of this Bureau should be concerned exclusively with the problems of small business.

Small business has an essential economic and human role in American life. All inequitable handicaps should be eliminated so that small firms may grow in a healthy way and compete more effectively with their bigger competitors.

Big business and small business are interdependent, one cannot live without the other. The distribution system of the nation consists primarily of small wholesalers and retailers who carry manufactured goods to market.

One of the complaints of small business is the mystery and delay which surround their applications for complaint; they say they drop their complaints in the hopper and never hear from them again unless and until a formal complaint issues or the case is dropped.

One of the duties of the Small Business Division would be to advise such applicants for complaint with reference to the precise status and progress of the investigations being made by the Commission.

A Conference Division should be established within the Bureau of Consultation to stimulate voluntary compliance. In the Sugar Institute case, Chief Justice Hughes said: "Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal process."

Business concerns, large and small, generally favor voluntary compliance with the law.

It is the object of the Commission to stop unfair and deceptive practices. If the practice can be stopped, and surely stopped, by informal procedures, the Commission's object is attained. Under such circumstances no order is necessary, nor should one be entered. If, however, the action of the wrongdoer does not insure cessation of the practice in the future, an order to cease and desist is appropriate. Such orders are entered, not as punishment for past offenses, but for the purpose of regulating present and future practices.

But in cases where everything that can be accomplished by a protracted proceeding has been or can be accomplished by voluntary co-operative effort, then the time and expense of trial should certainly be avoided.

Before a formal complaint is recommended the Conference Division should give the proposed respondent an opportunity to appear and show cause why a complaint should not issue. In those cases where the complaining party desires to do so, he should be permitted to appear and take part in an informal hearing. No testimony should be taken but it should be a joint conference between the Commission, the proposed respondent, and the applicant if willing. If this were done the Conference Division should be able to dispose of the majority of the potential cases of the Federal Trade Commission in harmony with the public interest and to the satisfaction of all concerned.

Pleadings and Issues Should Be Definitive

In litigated cases involving legal and economic complexities, the issues should be carefully particularized in the complaint. Discovery procedures, of course, are not available. For this reason the pleadings and issues should be made as definitive as possible.

An adversary hearing of the type required under Sections 7 and 8 of the Administrative Procedure Act cannot by its very nature be used as an investigatory process. Such a hearing, like any other trial, is for

the determination of issues.

Surprise and tactical advantages should be frankly eliminated in all administrative hearings. Particularization in pleading should be accompanied, in the big cases at least, by pretrial procedures involving the identification and authentication of exhibits, exchange of exhibits, exchange of written drafts of the proposed testimony of experts, stipulations of fact not subject to dispute, and a detailed plan for the hearing.

Other Responsibilities Require Consideration

There are many other phases of the Commission's responsibilities which I should like to discuss.

Delay in disposition of cases is one of them. It is believed that a management survey by an outside firm of management engineers is an essential first step in dealing with this problem. I have already recommended to the Commission that such a survey be made in order to eliminate excess paper work, simplify the structure of the Commission's staff, redefine the ground rules under which the staff operates, and decrease the work load of the individual Commissioners so that they are not overwhelmed by petty matters.

In closing, I want to stress the fact that the Commission seeks compliance, not punishment.

In order to accomplish this the lawyers, economists and accountants representing the Commission must approach each case in a spirit of fair play; they must be governed by the statute and the facts of the particular case, not by preconceived ideologies or theories.

Representatives of business must approach the problem in the same spirit; they must place public interest ahead of private advantage.

In some instances compliance can be obtained only through formal hearings leading to cease and desist orders. In many cases, however, voluntary compliance can and should be obtained through informal procedures, through investigation and consultation. This is one great advantage the efficient administrative agency has over the courts.

In each instance, whether compliance be voluntary or by order, the goal is the same—the prevention of improper practices and the perpetuation of our free competitive system through practical and effective enforcement of law.

Notice by the Board of Elections

■ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1954 Annual Meeting and ending at the adjournment of the 1957 Annual Meeting:

Arizona	Nebraska
Connecticut	New Jersey
District of Columbia	Oklahoma
Illinois	Puerto Rico
Iowa	South Carolina
Maine	South Dakota
Michigan	Texas
Mississippi	Washington
Montana	Wyoming

Nominating petitions for all State Delegates to be elected in 1954 must be filed with the Board of Elections not later than March 19, 1954. Petitions received too late for publication in the March issue of The JOURNAL (deadline for March issue, January 28; deadline for April issue, February 25) cannot be published prior to distribution of ballots, fixed by the Board of Elections for March 30, 1954. Ballots must be returned by June 7, 1954.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M., March 19, 1954.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts) nominating a candidate for the office of State Delegate for and from such state.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed on March 30, 1954, to the members in good standing accredited to the states in which elections are to be held as above stated.

BOARD OF ELECTIONS.
Edward T. Fairchild, *Chairman*
William P. MacCracken, Jr.
Harold L. Reeve.

Dramatic Plight in the Courtroom:

A Judge's Plea to the Bar

by Irving Ben Cooper • Chief Justice of the Court of Special Sessions of the City of New York

■ In 1952, according to the Federal Bureau of Investigation, of all the arrests throughout the United States, almost 50 per cent of the offenders had not yet reached their twenty-first birthdays. Juvenile delinquency has become a serious problem in almost every major city in the country. Writing from the point of view of the trial judge, Chief Justice Cooper tells graphically the real dilemma a judge must solve when one of the youthful culprits stands before his bench for sentencing. This is a condensation of an address delivered before the Section of Criminal Law at the last Annual Meeting in Boston.

■ The late Mr. Chief Justice Charles Evans Hughes once had occasion to remark:

> The Supreme Court of the United States and the courts of appeal will take care of themselves. Look after the courts of the poor, who stand most in need of Justice. The security of the Republic will be found in the treatment of the poor and ignorant; in indifference to their misery and helplessness lies disaster.

It is in the light of these sentiments that I address this professional body, as a fellow worker, to discuss a professional problem and to solicit your professional assistance. I have come to the right place, for I know the spirit of this Association: its guardianship of the general good, its unalterable belief in the equal right of all human dignity, its unswerving determination that the man in rags, even the avowed enemy of our present system of society, will have his day in court and justice will be done.

The function of judges is to be aware of, and to contain, the tensions built up through interaction of community, of complainants and their friends, of defendants and their friends, of police, of attorneys, of probation, prison and parole officials. Sentence should safeguard and harmonize the best interests of all these groups. Because, like physicians, justices can be more aware of the narrow choices possible within given situations than are the persons most vitally affected, the dilemmas and the drama of sentencing can be almost more distressing to judges than to the sentenced.

By no means least in importance, the obligation of judges extends to the offender's family, friends and circle of associates. In sentencing the delinquent, the judge makes a moral judgment on these also, singly and in groups. Parents, wives, children and friends may be more victims of the offender than the actual complainant. But the community's mercy and ability to rehabilitate the offender may lie almost wholly in this group.

The court's asset as an instrument for prompt hearings and trials, can become a liability if it lacks the essential aids needed for determining the circumstances on which crimes were based and out of which they grew, the degree of the defendants' educability, and the best and quickest means for returning them to or for removing them from the community. It would be all too easy for the court to deteriorate into a swift-moving panorama of human misery with the bare facts and the law applicable to them the only elements.

While it is normally to be expected that the largest percentage of irresponsible and illegal action in society would occur at the point where adolescents begin to mesh with the complicated structure and processes of adult society, it is a matter of grave concern when the F.B.I. informs us that of all the persons arrested in our country and charged with the commission of crime in 1952, almost 50 per cent had not yet attained their twenty-first birthday! Most of these are first offenders, "little people" in the matter of possessions and what is commonly considered social importance. Most of them are decent, law-abiding human beings, who in a moment of excitement, strain or depression gave vent to impulses whose strength they had rarely admitted to themselves, and

Irving Ben Cooper
Chief Justice of the Court of Special Sessions of the City of New York

became enmeshed in the criminal law.

What do you do with the brilliant college student who picks up a piece of jewelry in a store so that she can look pretty when she is married in a week or two? With the university boy who in a moment of silliness commits an act of exposure that brings him before the criminal bench? With the attractive young lady who has become a drug addict and wants to marry the source of her supply—a man with a long criminal record? What do you say to her parents standing before you wrung white with the anguish resulting from the arrest? Is it sufficient to rule "guilty", "innocent", "fingerprint", "reformatory", "prison"? Are we really coping with the broad problems of human life when we permit the community to believe that a criminal court handles only the untouchables?

My plea is addressed to the plight of the young first offenders whose numbers are legion. Generally speaking, every first offender is a potential recidivist. The stake which the community has in the legal process is that he should not actually become one. The object of sentence, then, should be to fit the punishment *not* to the crime, but to the offender.

Today we speak less of punishment as retributive, as deterrent or as regenerative. We are more aware that the sickness of the soul that brought about the crime is not to be properly treated by a given number of dollars in fines or of days in prison.

And so they come before the courts, month in and month out, day after day, an apparently unending line of human misery and tragedy. How are we equipped to handle them?

Judges Are Groping in the Dark

What judges want to know at this point is:

Why did he commit his act? Others about him, somewhat similarly placed, have not so acted. What was there in his experience to turn him criminal?

What of his home, his relations with parents, siblings and neighbors? With social institutions? With peer groups? With friends and boon companions?

Who has influenced him? After whom did he mould himself? What variety of activities did he participate in?

What have work, love, marriage, parenthood meant to him and how has he behaved in these relationships?

Most important of all, what variety of opportunities was open to him? Did he participate in his culture and cherish it? Was he proud to be an American, a Jew, a Catholic, a Negro?

What interests does he now have? What skills? Whom does he love? Hate?

It is inadequate answers to these inquiries that pose the dilemmas of sentencing.

Insofar as a sentence is a prescription for remedial treatment of the crime as a given personality syndrome, judges must have information about the constitution of the delinquent and the extent of his moral involvement.

How normal in physical health, mentality, emotional stability, capacity for sustained effort is he? What were the provocations provided by the complainants and by the community in which he was reared and which set the behavior patterns after which he moulded himself? Were strife and thievery, as with the Spartans, the "mode" of the neighborhood, a black eye a decoration and not a reproach? What of the cultural and civic resources of the neighborhood? The religious institutions in which moral values and codes are taught, exemplified and highlighted with festival? The schools, playgrounds, political clubs, public libraries, police, sanitary and other services—how adquate were they to help form the defendant? How powerful are these upon him now? What capacity for sound living has he shown to date? What is his ability to learn to integrate new experiences? What is his moral potential? What resources will be needed to free this potential? Who stands ready to help him? Can he learn faster in the community or does he require to be withdrawn from associations and conditions in which he has been formed? What kind of community will give him support he must have? What incentives can the community provide to help energize his will?

All Types of Offenders Come Before Courts

Offenders differ in their biological capacities, their family and community background and how they have integrated these factors into a "character". In some instances their heritage has seemingly been a rich one and they have seemingly misused it. Other offenders seem to have suffered the spite of nature, family and community and to be more sinned against than sinning. The court, in planning how much and what kind of re-education is called for and where it shall take place, must concern itself with both these aspects of defendants' needs and the communities' blame.

There is a small but real minority of offenders who exhibit a considerable fund of moral understanding.

They themselves reach eagerly for the rod and possess the will to acknowledge, accept and use the lessons to be learned from their acts. They are eager to make restitution. The steps imposed by the law in bringing the case to settlement have in themselves been severe punishment.

There is a further considerable group of first offenders who are culpable and need re-education, but are fortunate in their background, family and friends. A very large number of the court's cases come from good homes in good neighborhoods. In many instances parents have seen the shadow of the event hovering over the child for some time and have taken steps to avoid it.

The great mass of offenders consists of persons who have not made very good use of their opportunities and who are prone to give vent to their feelings at slight provocation. They accept the easiest way out of trying situations. They have never really faced up to life as a challenge.

A common factor in most of these cases is that, set against the life situation, the criminal charge lacks major importance. Where there is so much deep-seated misery one additional increment does not seem to matter too much. The life situation may inhere in the defendant's relations to his mother or father, to his family tradition, to his neighborhood associates, to the social situation of his school or shop or other place of employment, to the standards of the community as these are reflected in the magazines, papers, movies, actions of important people, envy of others. Treatment involves dealing with these primary causes.

The need of these defendants for the help of society and the court is greater than that of the morally sensitive and the family-bolstered individuals. For these misguided defendants are in great peril—the peril of rejecting and of being rejected by the community. Their own inner resources, often considerable if they can be reached, are blocked by widely publicized community standards which have been hammered into them by print, screen and radio. In many cases the family, source of moral and sentimental education, has taught them to be immoral and hard. There will be no reinforcement to them or to the court from this source.

The test of what I am proposing to you lies with this majority group. A significant measure of the blame for the situation in which the defendant finds himself belongs to the community. He has been deprived of much: human interest, patience, the opening of doors closed when they should have been open and open when they should have been closed. The re-education process will now involve first a series of professional men and women, lawyers, judges, men of medicine, probation officers, social workers, recreation leaders and ultimately most important of all, the men and women of the community organizations in and through which he must establish his revised pattern of living.

Probation Is One of the Best Tools for Rehabilitation

The primary purpose of probation is to restore and preserve the individual's value, uplift character, rebuild marred lives; it is concerned with the ability of delinquents to adapt themselves to the conditions of community living and with the willingness of the community to help them re-establish themselves.

Probation has come to its present importance in the treatment of adult offenders because it has demonstrated itself a valid instrument of moral re-education in a very considerable proportion of cases in which it is used. Probation is participating actively in the development of new knowledge about the genesis and mechanisms of behavior. The child is literally the father of the man.

The probation officer is the focal point in the process of the defendant's re-education because his interest, friendship and concern spark the defendant's will. The defendant makes an effort as proof of friendship and to show off his native powers. He feeds on the probation officer's understanding and admiration and with this help is gradually enabled to make other contacts, to set up new associations, to take on responsibilities. This dependence sometimes lasts for many years beyond the termination of probation.

If the courts had an adequate probation staff the preliminary report on the offender would detail the facts about family, culture, background, education, degree of intelligence, medical history, mental breakdowns, personality design, social relations and sources of social strain as indications for treatment. The court would then be in a position to specify that certain of these needs were to be met by the defendant, or supplied under authority of the court.

Public opinion must be educated to expect courts to look behind the criminal act to the human or social situation which it reflects and of which it is a symptom, and to provide the needed staffs to do this.

And so they come to us with deep wounds induced by the factors above described. With only Band-aids to bind up most of them, what chance of healing is there? What of reinfection?

This is a challenge no more invincible than many others that this great Association over the years has met and resolved for the betterment of the commonweal. You believe as I do, that while endless debates go on concerning the correct blueprint for Utopia, we must concern ourselves with the tremendous force of simple truths: that poverty of mind and spirit is as awful as poverty of the body; that in the fuller, richer, real democracy *everyone* counts; we know the significance of imbuing each person with a sense of belonging.

But one thing is certain. The community cannot permit the court to fail in its efforts to understand and meet the needs of this group. Probation is as much an arm of correction as Sing-Sing and Alcatraz, and not less important.

Is Legal Education Doing Its Job?

Brief of *Amicus Curiae*

by **Albert K. Orschel** • of the Illinois Bar (Chicago)

■ In the November, 1952, issue of the *Journal*, we published an article by Arch M. Cantrall, of the West Virginia Bar, that expressed strong criticism of present-day legal education and argued that our law schools do not prepare the student to practice law. The article evoked a storm of protest from lawyers and legal educators alike, several of whom have answered Mr. Cantrall on our pages. Mr. Orschel's article expresses the view of one who acquired teaching experience after many years in active practice.

■ It is gratifying to observe the recent discussions by members of the Bar and legal educators concerning the effectiveness of legal education,[1] a subject which requires constant reconsideration. Although there is recognition of the need for co-operation,[2] the question may well be raised as to whether the schools have aggressively undertaken to awaken the interest of the active Bar in the intriguing problems involved. If such interest were nurtured, the schools have every right to hope that members of the Bar will not only be able to offer help in the area of legal education itself, but will also be more inclined to shoulder the increasing financial responsibilities, to aid in augmenting enrollment and to welcome with renewed enthusiasm the young law school graduates.

It would be unfortunate if this current exchange of ideas departed from the level of an earnest discussion and entered the realm of acrimonious controversy. It would be unfortunate if the legal educators failed to welcome wholeheartedly the interest of the Bar on this subject. The revitalized participation of lawyers in their responsibility to legal education would constitute real progress.

The articles presented to readers of the AMERICAN BAR ASSOCIATION JOURNAL present two widely different views. Mr. Cantrall argues that law schools are not adequately training students in the techniques and skills of practicing law. Dean McClain defends the over-all educational programs. In my opinion, any study relating to the nature of the curriculum cannot be successfully resolved until some fundamental changes in concepts and methods of legal education are first considered. The gap between formal legal education and techniques and skills of the lawyer which is clearly acknowledged[3] can be closed and the curriculum revised only after some of the reasons for the gaps are examined.

In setting down my personal observations (most of which are neither new nor novel) as to possible reasons for such gaps, I do not approach the subject so much on a scholarly or scientific level as on a realistic, even earthy, one. I bring the point of view of one who has practiced law as a partner in one of the large active firms in Chicago for twenty-odd years; who was able to satisfy a long-standing ambition and who will be ever grateful for the opportunity to teach law on a full-time basis for two academic years. I participated in the employment of many law school graduates and watched their development as lawyers; I have had at least a limited view of current legal educational methods.

I must preface my remarks by pointing out as forcefully as I can the responsibilities of a legal educator and the difficulties which he faces. Any reasonably conscientious teacher (most of them are) is faced with the problems of blocking out and developing his courses, keeping them vital and up-to-date, recognizing the new developments in the

1. Arch M. Cantrall "Is Legal Education Doing Its Job?" 38 *A.B.A.J.* 907; Joseph A. McClain, Jr. "Is Legal Education Doing Its Job? A Reply" 39 *A.B.A.J.* 120; Arthur A. Ballantine "Presenting the Law: A Different Approach." 5 *Journal of Legal Education* 345.

2. Albert J. Harno, *Legal Education in the United States* (1953) page 187.

3. Harno, page 172.

field and meeting the challenge of the bar examinations. His problems are as troublesome as those facing the practicing lawyer. The pressures are different; the educator does not have the deadlines, the unreasonable clients, the exasperation of too many jobs at one time and the worries of none at another. But he may well lie awake at night groping for a solution of the problems of teaching coverage (too much or too little), fair yet searching examinations (one of the most difficult tasks any lawyer ever meets), correcting papers (a strange combination of boring monotony coupled with the heavy responsibility of knowing that the marks he gives may sharply affect the lives of young men).

Teaching is a gratifying occupation for one who is interested in the refreshing and challenging attitude of an alert student body, who welcomes a periodic foray in preparation of noncommercial legal writing, and who enjoys the unequalled gratification of reading an examination paper entitled to an A, knowing that at least some part of that accomplishment stems from his own efforts.

Selection and Advancement of Law School Faculty

No institution can rise above the level of the personnel. Therefore, the first point of inquiry must be an examination of the manner of selecting law teachers and the standards for their advancement.

(A) *Selection.* There is available at least one set of criteria established by the dean of one of the fine law schools for the selection of law teachers.[4] Although Dean Prosser disclaims his acceptance of the principle, it is quite evident—and my own personal experience is complete proof—that "in a university the office should seek the man".[5] One of the most devious processes I have ever witnessed is that of teaching appointments. The etiquette would be amusing were it not for the fact that it is the source of many maladjustments. It simply is not *comme il faut* to solicit a teaching job. You must wait patiently—if you can—for an offer. Granted that a man who solicits a job may adversely affect his bargaining position, recognizing the propriety of the ethical canon which forbids a lawyer from soliciting legal business, I insist that many teaching assignments are made with no regard for the teacher's qualifications for the particular course, *i.e.*, a competent man at real property having to undertake to teach corporations. Because of this deep-seated taboo or prissiness, a law teacher is restrained from seeking an association with another institution where there may be a more congenial environment in which to pursue his particular talents, objectives and interests. Thus, misfits (good but misplaced teachers) are frequently frozen into the wrong position.

Proceeding to the qualifications for prospective law teachers, the first and foremost inquiry continues to be "What have you written?" I want it distinctly understood that an ability to write an erudite legal treatise is a quality to be deeply respected and is certainly one yardstick of a brilliant student. The teaching profession must assume leadership in delving into unexplored legal fields and offering its studies to the profession. But I insist with the greatest conviction that the mere fact that a scholar has a brilliant mind and can produce volume after volume of erudition does not in any sense make him a good teacher. Need I labor the point that there is no direct relationship to proficiency in writing and effectiveness in the classroom as a teacher? Lawyers have long recognized that a good trial man may not succeed in appellate court work; the sharp distinction of the English system between the barrister and the solicitor is surely an acknowledgment of the diversity of legal talents.

If the system of evaluation described by Dean Prosser is to be accepted as typical, the matter of experience is relegated to a relatively minor role. "Most deans I have talked to seem to think that three years of practice is about right. Five would certainly be better, were it not for the fact that by that time it becomes extraordinarily difficult to wean a good man away."[6]

What client would entrust a lawyer with three years' experience with the development and execution of a complicated estate-planning problem? What corporation whose securities are listed in a national exchange would entrust a plan of refunding to a lawyer with five years' experience? What insurance company would place its litigation in the hands of a trial lawyer four years out of school? Why, then, should the young men who are being trained to be lawyers be asked to rely on instructors whose practical experience in a very practical profession is of such a limited nature? Of course, young men with sound and brilliant scholastic records and proved ability to serve as editors of law reviews are likely candidates for teaching positions; I simply say they are not the only candidates.

The point that annoys me to exasperation is the corollary which is stated by the Dean as follows:—"One thing on which all law schools are in agreement is that too many years of practice hardens the arteries, stunts the intellect, and ossifies the ideas, so that few lawyers over the age of 50 are ever much of a success when they retire and enter teaching."[7] (It is, by the way, a rather startling medical prognosis which hardens arteries of practicing lawyers and leaves teaching lawyers of the same vintage quite immune! If so, could it be that they do not work as hard?) Although this statement is undoubtedly made as a jest, it does indicate the attitude of many deans and law teachers towards the experienced lawyer. In almost any other activity, practical experience is an asset, not a liability. I have been told on several occasions when I was soliciting a teaching assignment that an experienced lawyer

4. William L. Prosser—"Advice to the Lovelorn" 3 *Journal of Legal Education* 505.
5. Prosser, page 507.
6. Prosser, page 513.
7. Prosser, page 513.

has a tendency merely to reminisce and describe his own exploits. I question whether a conscientious practitioner turned teacher would so lose his perspective as to fail in his obligation to his students who have now become his clients. In my opinion, this barrier against practicing lawyers which is deep-rooted in law school circles is unsound and is one of the prime causes for the inability of the schools to satisfy the demands of lawyers, for whom Mr. Cantrall so effectively speaks, to develop the teaching of the lawyers' skills and techniques *as well* as to teach the substantive law.

Dean McClain voices this prejudice when he questions whether practicing lawyers make good teachers.[8] May I ask the Dean whether all experienced faculty members are good teachers? Will not the Dean agree that many established teachers who have produced learned and valuable legal treatises have been completely stuffy and uninspiring as teachers? The laws of libel and slander prevent me from citing instances!

Why are not the men who have practiced possible candidates as teachers? Does the fact that they have faced and solved the actual problems of litigation, drafting, advocacy, constitute a teaching handicap as against a man who has never had a client? Is their intellectual capacity and knowledge of substantive law any less? Do not the reams of paper work —wills, charters, leases, pension plans, opinions—display an ability in legal writing as valuable, if not as well publicized, as a law review article? Perhaps the Dean's applicants have been unfortunate; "One gathers that every broken-down lawyer who has made a failure of practice in Keokuk, or Kankakee, or Kokomo, or Kalamazoo, or who is in difficulties with authorities, or the discipline committee, or his wife, feels an irresistible urge. . ." to teach.[9]

The fact is that when I announced my intention to teach, a surprisingly large number of successful members of the Bar indicated a lively interest in teaching. Only the successful lawyers can afford to enter into this program. I certainly do not argue that faculty groups should consist entirely of practitioners. But the old adage about the new broom is still sound. The experienced lawyer has much to gain from an association with a law school in stimulation, intellectual challenge, enjoyment; and the school can profit immeasurably by squeezing from the "old counselor" the wisdom of his experience.

I am distressed at Dean McClain's negative attitude toward improvement of faculty personnel.[10] The case is not "hopeless". My experience indicates that little earnest effort has been made to draw to the faculty ranks competent practicing lawyers; it has been taken for granted that the rewards are so slim that they won't come. I will not accept the results produced by part-time teachers. Teaching is a full-time job (certainly the permanent personnel will support me on this point); the part-time teacher cannot be counted on to share in the burdens and responsibility of long-range plans and improvements. The infiltration into teaching staffs of practicing lawyers having a sound background of experience may well be one of the most salutary steps in the future development of legal education.

(B) *Advancement.* The road up the academic ladder is a slow one; the teacher cannot solicit another job but must wait until the university seeks him. Thus, he has relatively little bargaining power which he can increase in only one sure way —by writing and publishing articles. In casting about for needed teachers "in the slave market" (the "slave market" convenes at the annual meeting of the Association of American Law Schools[11]) the qualifications are measured largely by the volume of published writings.

If a man has written enough to have been observed, he may then get an offer. This offer he promptly takes to his own dean and thus accelerates his advance, both in rank and in compensation. Is he a good teacher? You would scarcely ask it of the prospect himself; you wouldn't dare ask it of the dean of the school from which you are about to take the applicant. Has he put his students to sleep with his learned diatribes or has he inspired them and given them a true intellectual curiosity? There are no students at the slave market to pass judgment. There are no questionnaires relating to teaching ability *because no standards of teaching excellency exist!* No, the test is primarily publishing and writing.

In order to write for publication —the *sine qua non for* employment or advancement—the teacher must work—and work hard in the library at his typewriter. Where do those hours come from? In my opinion they are taken away from the job for which he was employed—to teach his students.

I have written but one law review article;[12] I enjoyed doing it, but it consumed more than one hundred and sixty hours—one full month of

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8. McClain, page 122.
9. Prosser, page 505.
10. McClain, page 122.
11. Prosser, page 511.
12. A. K. Orschel, "Administrative Protection for Stockholders in California Recapitalization", 4 *Stanford L. R.* 215.

working days. Even book reviews required from 30 to 40 hours,[13] although perhaps I am a slow reader! The ambitious teacher who is devoting his time to writing is filching that time from his activities as a teacher. The entire emphasis on writing produces a pressure which often makes teaching a stepchild. The writer does not have time to encourage his students to come to his office; I am convinced that many students are being short-changed. The emphasis on "publish or perish" is completely misconceived as a teaching qualification—either for initial selection or advancement.

(C) *Teaching Standards.* I hesitate to set forth the yardsticks by which a teacher should be measured for his selection or advancement. May I venture to suggest the following as possible standards—in addition to his publications:

(a) Are the examination questions which the teacher propounds fair, searching, comprehensive in scope?

(b) How do his students answer those questions? What have they learned from him as reflected by their answers?

(c) How does he measure up to the faculty's standards—assuming, of course, that the faculty has a plan of appraisal?

(d) Are his lecture notes for sale? If they are—well, it simply means that he is giving the same lecture year after year! The sale of lecture notes is frequently a highly profitable business.

(e) How long are his office hours for students?

(f) To what extent has he picked the brains of lawyers in his locality for the problems which they have had in his field?

(g) Although it is by no means a conclusive test, what are student reactions to his teaching? Does he arouse their curiosity, challenge their intellect, inspire their efforts?

(D) *Teaching Methods.* I wish only to make a very few observations on teaching methods. The principal method of grading students continues to be the final examination—a three- to four-hour test on which a man's whole career can depend. I repeat, and it bears repetition, that the preparation of a fair examination question is as hard a job as any lawyer can ever face. I repeat, and it bears repetition, that the fair evaluation of the answers to the presumably fair questions is a soul-searching responsibility. When the task is done, the student receives a grade—it is either a "B" or a "74" or some other equally inanimate mark. How did the student answer the questions? Did he grasp the problems? Did he analyze the facts properly? Did he argue effectively? What were his weaknesses? The student never knows. I have in my files 143 bluebooks; not one of my 143 students knows anything other than the final mark. The books were not to be returned. I defy anyone to tell me that this is a proper educational process. Some of those 143 students didn't recite more than once during the entire course. I couldn't form any sound judgment as to the ability of all my students from those classroom recitations attended by seventy to ninety students. Law students are not taught; they are simply exposed to information. More often than not they are given no help by the faculty to bridge their weaknesses or encourage their strengths. To my way of thinking, they are forgotten men; yet of all groups of citizens who need the benefit of every ounce of thoughtful instruction, their need is among the greatest.

What suggestions? Several. The importance of the examination is recognized, but there should be a sharp effort to de-emphasize it. Admittedly, the Socratic method is the proper one to teach law, but it requires great skill, and many of the hundreds of average law teachers (those who are not and never will be an Ames, Williston, Hall,[14] but who are good men none the less) cannot possibly effectively put it into practice. When only sixty hours are allotted to the teaching of a substantive course—for instance, corporation law—instructor and students are working under forced draft. Classroom discussions are usually monopolized by two general categories: the top-ranking students whose confidence and ability enable them to participate, and the show-offs or hecklers who always manage to badger the instructor and delay the progress of the class.[15] The large body of good but not brilliant students (possibly 70 per cent of the class) lapses into relative silence with no opportunity to develop their skills and even less opportunity for observation by the instructor. I found that by asking groups of students, not to exceed twelve in number, to my office for one hour each week, I could learn more about the progress—or lack of it—than in all the sixty hours of classroom work put together. I know we all could participate actively in uninhibited discussions. I found it no great burden on my time to thus add six or seven hours more to the work week, a relatively small amount of time in relation to the demands of active practice. True, to take this much more of the teacher's time takes away from that writing commitment. But is not this type of activity the primary obligation of members of the teaching staff?

To the extent that the examination continues to be the measure of a student's ability, it must serve as an educational process. This can only be done by the expenditure of more time on the part of the teacher. Marginal comments on the returned blue book would certainly serve as a teaching device. Individual or group discussions of the examination should be a part of the teaching process; if the school year has to be extended a week to accomplish this purpose then I say "Amen, let's do it." Interim written assignments, prepared in a contemplative atmosphere and not under the pressure of the "final exam", are more typical of a lawyer's needs, though, of course, they would take more time to correct! I go back to our major point—students can be given more of the lawyer's skills in the teaching of the

(Continued on page 166)

13. Book Review, Ballantine & Jennings "Students Corporation Law Service" 39 Cal. L.R. 317. Book Review, Latty, "Introduction to Business Associations", 4 *Journal of Legal Education* 225.

14. McClain, page 172.

15. Harno, page 166; Robert McGechan "A New Zealander's Comments on American Legal Education", 5 *Journal of Legal Education* 286, 292.

Congressional Investigations:

Are They a Threat to Civil Liberties?

by Lloyd K. Garrison • of the New York Bar (New York City)

■ As Mr. Garrison points out, investigations by the various committees of Congress are not new—the first congressional investigation was authorized during the Administration of President Washington, and the tradition has now become firmly embedded in American government. But the whole subject has perhaps never been so much the center of controversy as today, particularly since the proceedings have begun to be broadcast on television. Speaking as a participant in a panel discussion in Faneuil Hall, in Boston, during the Diamond Jubilee Meeting, Mr. Garrison discussed some of the problems that are raised by congressional inquiries and suggested methods to solve them.

■ Congressional investigations are a peculiarly American invention, born of the separation of the executive and legislative branches. They have served the country well and we could not do without them; but in recent years some of them have developed excesses which have caused their friends both in and out of Congress much concern.

In the way they treat witnesses and persons accused by witnesses, the committees may be likened to a poker, cool at one end and hot at the other. At the cool end, we see them performing their earliest historical function of checking up on the executive branch, seeking information and scrutinizing this or that activity. Congress has been at this salutary task since 1792, and in the course of it questions of civil liberties have seldom been presented.

At the cool end also are those investigations where the object is to get facts needed for the shaping of legislation. It was not till 1827 in the House and 1859 in the Senate that investigations of this sort, backed by the subpoena power, were instituted, but they have grown apace with the increasing complexity of legislative problems. In these inquiries, private citizens have been witnesses more often than government employees, and private rather than official acts more often the subject of examination; but where Congress has had a clear legislative end in view and the committees have sincerely sought light on defined and specific problems, questions of civil liberties have rarely arisen.

In both the executive and the legislative fields the process of investigation may shift toward the warmer end of the poker where the committees' motives are less simple and direct than those which have just been described. The bias against particular agencies or private groups has at times been so strong that their representatives or members have been treated less than fairly. Liberals and conservatives alike have complained of this sort of treatment.

The hot end of the poker begins to burn when the committee's target is no longer an agency or group but a single individual. There the individual, on trial for his actions, associations or beliefs, stands isolated and virtually defenseless. He may contend that no legislative purpose can be served by the investigation, or that given questions are not relevant to the subject matter of the inquiry, or that a subpoena of his private records is too broad; but these defenses are for practical purposes worthless (see the illuminating analysis by Judge Wyzanski in the March, 1948, issue of the *Record of The Association of the Bar of the City of New York).*

The witness may of course claim his privilege against self-incrimination and suffer the inferences which the public generally, and it may be justifiably, draws from such a plea. Apart from this he is substantially at the mercy of the committee. In extreme cases, where the investigation may destroy his livelihood, regardless of the truth of the charges, and the committee knows this or even encourages such a result, the committee's action may come close to being a bill of attainder. "A bill of attainder" said the Supreme Court in the post-Civil War case of *Cummings* v. *Missouri,* 4 Wall. (U.S.) 277, 323,

"is a legislative Act which inflicts punishment without a judicial trial"; and a similar pronouncement was made in the companion case of *Ex parte Garland,* 4 Wall. (U.S.) 333. In those cases the Court reversed the convictions of Cummings, a Roman Catholic priest, and of Garland, a lawyer, for practicing their callings without swearing that they had never taken arms against the United States or abetted its enemies.

These cases were reaffirmed in 1945 in *United States* v. *Lovett,* 328 U.S. 303, where the Court said at page 318 that "When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisaged. And so they proscribed bills of attainder." The Court accordingly held unconstitutional an act of Congress prohibiting salary payments to three named employees charged by a Committee with disloyalty. The Court said that: "What is involved here is a Congressional proscription of Lovett, Watson and Dodd, prohibiting their ever holding a government job. Were this case to be not justiciable, Congressional action, aimed at three named individuals, which stigmatized their reputation and seriously impaired their chance to earn a living, could never be challenged in any court. Our Constitution did not contemplate such a result" (page 314).

Persons Under Investigation Should Not Be Denied Rights

When a congressional committee in an investigation aimed at particular individuals "stigmatizes their reputation" and "seriously impairs their chance to earn a living", to use the language of the Court, the action is not far in effect as well as in spirit from the action condemned by the Constitution, even though the committee does not directly inflict the punishment but leaves that task to others, having reason to expect its due performance. The very fact that the committee's action, though close to a bill of attainder, is not literally one, emphasizes the need of affording defendants in these "legislative trials", to the fullest possible extent, the basic protections extended to accused criminals by the Bill of Rights.

And not to defendants only. Innocent outsiders may be, and in late years frequently have been, accused by witnesses in the course of particular investigations without an opportunity to appear and be heard in their own defense; and even where that opportunity has been given the defense has never yet caught up with the accusation.

In the light of these abuses numerous reforms have been proposed in recent years, by leaders of the Bar, law teachers, The Association of the Bar of the City of New York, students of government, and members of Congress from both sides of the aisle. The proposals are of three sorts.

The first would bring the executive and legislative branches closer together in knowledge and understanding, so as to lessen the number of investigations and to improve their temper and narrow their scope. Outstanding is Senator Kefauver's bill for a question period in Congress comparable to that in the House of Commons, but adapted to the American scene. It seems to me wholly admirable in concept and in detail. It would not, however, affect investigations of individuals unconnected with the government, where the most severe abuses have occurred.

The second type of proposal relates to the all-important question of personnel. One measure, for example, would concentrate investigations in the hands of the standing committees and their subcommittees. This was intended by the Legislative Reorganization Act of 1946, but has not been fully accomplished. The great objection to special committees is that the person who proposes the resolution invariably is appointed chairman and then runs the show, whatever his qualifications.

Another set of proposals relating to personnel would sharply (and I think rightly) curtail the power of the chairman. Thus it is suggested that a majority of the committee should be required to authorize certain important steps, such as initiating an investigation, defining its scope, issuing subpoenas, finding a witness in contempt, deciding whether a given hearing should be public or in executive session, releasing or making use of testimony given in executive session, and approving the text of interim and final reports. Plainly there is need of a greater assumption of responsibility by committee members in spite of the heavy pressure for time under which all members labor. There is general agreement that all investigating committees should be provided with expert staff and counsel. It has also been proposed, with obvious justification, that committeemen and staff members should be precluded from speaking or writing about the committee's work for compensation, and that predictions and conclusions, which have so frequently prejudiced individuals, ought not to be publicly aired in advance of the report.

The third type of proposal has to do with procedural rules, of whose importance we as lawyers are particularly aware. The rules most frequently advocated are that a person who believes he has been injured by the testimony of another should have the right to appear and be heard, to call witnesses on his own behalf and to cross-examine his accusers, with the aid of counsel and of committee subpoenas if need be. These elementary rights, the core of our Anglo-Saxon system of discovering the truth, are long overdue in congressional investigations. They are needed not merely to protect the individual but even more importantly to bring out the truth in the public interest. They must obviously be subject to limitations and controls, lest the time of committees be unduly wasted and the proceedings get out of hand. These limitations and controls will not be easy to work out, and some degree of flexibility and room for experimentation seems de-

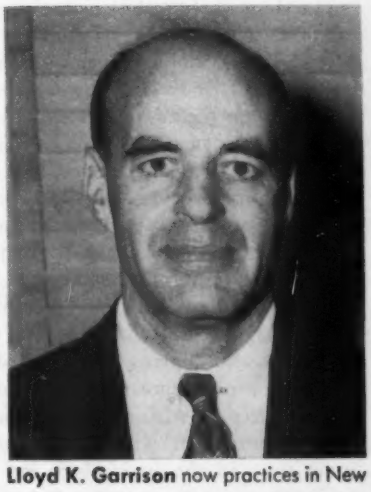
sirable. But the practical problems, such as they may be, ought not to be allowed to delay action where the principle at stake is so clear.

At least one committee has successfully conducted an investigation in which all parties were given the right to examine and cross-examine witnesses and to rebut adverse testimony. This was the House Judiciary Committee's subcommittee on the study of monopoly power, under the chairmanship of Representative Celler. Concededly it operated in the cooler zone of seeking light on specific legislative problems and did not have to cope with the emotions and tensions that are aroused where a committee's object is to expose the activities, associations or beliefs of a particular individual. But even in investigations of the latter sort, where the rights in question are so essential to the ascertainment of the truth, there is no reason to suppose that the successful experience of the Celler committee could not be duplicated, given a competent chairman and rules of reasonable limitation.

What Should Be the Scope of Investigations?

Now I turn to the question of the scope and reach of congressional investigations. This is of basic importance because even if rights of the sort just discussed are granted, they will necessarily fall short of those prevailing in courts of law, given the practical requirements of committee operation. Moreover the existence of these rights will not prevent the mere making of an accusation from irretrievably injuring the reputation of the person accused, however innocent he may later prove himself to be. This difficulty might be cured if it were possible to establish some closely safeguarded procedure, comparable to that of a grand jury, where charges could be sifted in private before any person was subjected to the humiliation of being publicly interrogated or denounced. But it is doubtful whether such a procedure could be worked out. Probably the nearest thing to it is the frequent practice of examining witnesses in executive session before a decision is reached as to whether to call them publicly; but this procedure in turn is unsatisfactory: because of time pressure, the attendance at executive sessions is generally meager and but little attention can be given to weighing the evidence after it is in; leaks to the watchful and sometimes prying press may occur, to the prejudice of the witness; and, particularly if the witness is a well-known person, the fact that he has been called is almost sure to become public knowledge and in and of itself is harmful to him. Finally—and this applies of course to public as well as executive sessions—the triers of the facts are politicians, of whom it can be said with certainty that they are neither juries nor judges.

These difficulties are inherent in trying to convert legislative investigations of individuals into the semblance of judicial trials. The judicial safeguards against falsehood and harassment which we so rightfully revere simply cannot, in full measure, be adapted to investigating committees. It follows from this that Congress should exercise the utmost restraint in launching investigations of individuals where by the very nature of the process, even after all practical procedural reforms have been made, full justice cannot be done and truthful conclusions cannot be assured. It does not follow, however, that there are any areas of American life which should permanently and under all circumstances be blocked off from the scrutiny of committees. Congress would not stand for such a limitation and the public interest would not be served by it. We need only recall a few of those investigations in which the careers of individuals were shattered but the country was the gainer: Teapot Dome, for example, and the King Committee's recent investigation of the Bureau of Internal Revenue, and other inquiries into alleged frauds upon the government. Similarly, some of the exposures of Communist infiltration into government, illustrated by examples of particular individuals, helped to illuminate the nature and objectives of the Communist Party and the steps that the government must take in self-defense.



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What is needed is not a fixed limitation upon the scope of congressional investigations, but the assumption of a greater degree of responsibility by Congress as a whole for what is done in its name. Even the Supreme Court upon occasion has had to be admonished to exercise self-restraint within its sphere of power. The time is surely ripe for a congressional stock-taking of that which it is permitting its committees to do, particularly in the field of alleged subversion, where because of the natural anxieties of our citizens and the dazzling glare of publicity committee activities are heavily concentrated.

In this most sensitive field of inquiry, the investigations have proliferated out into the community in an ever-widening circle, embracing all manner of people unconnected with the government or with the defense effort, in walks of life far removed from any possibility of sabotage, espionage or interference with the economy, and far removed also from

any serious likelihood of federal regulation. It is in these investigations that the maximum harm can be done to innocent individuals with the least gain to the country. I suppose that wherever in private life a Communist member is made to suffer from public exposure some damage, potential or actual, is done to the Party, and this may be chalked up as a gain; but we must measure the cost on the other side of the ledger. There is, to begin with, the injury to those who, having been called to testify, are not shown to have had any connection with the Party, or whose connection with it was at some time in the past. More seriously, the spreading ambit of these inquiries into men's beliefs and associations, past and present, contributes to the general state of timidity and conformity that is creeping over the land and sapping our vitality as a nation. Nothing is more un-American than timidity and conformity. And nothing is more risky in the age in which we live.

We are living, as Toynbee puts it, in a "time of troubles". In such a time it is above all things important that we the people of the United States should remain clear-headed, unafraid, resourceful in our thinking as in our actions, and ready to change old policies, and, if need be, invent new ones, as circumstances may require. The censorship of books, attacks upon schools, colleges, newspaper editors and clergymen, the browbeating of those both in and out of government who dare to criticize the conduct of investigations, the multiplication of loyalty oaths and tests for various kinds of private employment, the building up of multitudinous dossiers on the private lives of citizens, the use against individuals of the undisclosed contents of reports prepared by secret agents, the increasingly intolerant treatment of immigrants and aliens, the excessive encroachments upon executive functions, and the spreading abroad of fear, suspicion and confusion—in these developments lie serious risks to our national sanity and our capacity to deal boldly and creatively with a world in ferment.

It would be unfair to ascribe to congressional investigations all of these threats to our true security. Many of them stem from state and municipal actions, and many are initiated or furthered by private groups. But what Congress does affects the whole body politic more powerfully than any other influence; the dramas of the committee rooms radiate outward to a watching and listening public and profoundly affect for good or evil the patterns of thought and emotion which in the end will shape our destinies.

So I say that there is no more urgent need than for Congress to assume responsibility not merely for improving the procedures of its committees but for passing upon the scope and reach and aims of their investigations.

What, then, specifically should be done? Two possible courses, among many which have been proposed, suggest themselves. The first would be for Congress to establish a joint standing Committee on Investigations, composed of leading members of both houses, to which all requests for investigations would be referred for study and recommendation. The joint Committee would first consider whether or not there was need of the investigation, balancing gains and risks from an over-all national standpoint. The joint committee would also consider how the investigation could best be conducted, whether by a standing committee or a special committee, or (as has often been suggested) by outside experts or officials together with Senators and Representatives, or by officials or outside experts alone, with or without the grant of particular powers. The joint committee would also consider whether any special procedures or safeguards should be adopted, consistent with the practical requirements of the task to be done, and having in mind the extent to which the rights of individuals might be adversely affected. The joint Committee would be required to report within a stated time, and its report would be recommendatory only, final responsibility being borne by the particular house involved.

A second step forward could be taken by Congress's adoption of minimum standards for the conduct of all investigating committees, defining the functions of chairmen and the duties of members, and the rights of witnesses and persons accused by witnesses. The makings of these minimum standards already exist in various pending bills introduced by Senators and Congressmen who have given long and patient study to the matter. Several committees have, in addition, adopted rules of procedure of their own which mark a real step forward. Common agreement should be possible, and the standards when adopted could from time to time be improved by particular committees and by Congress itself after adequate experimentation.

There will of course be many difficulties in the way of any reform: the vested interests of particular committees, the ambitions of individual Senators and Congressmen. But Congress is responsive to the will of an informed people, and no one can more wisely lead the people or advise the Congress in these matters than our own profession. Upon us whose privilege it has been to discern the true nature of liberty and the proper limitations of political power rests a great responsibility. I hope and believe that we shall shoulder it and thereby justify our birthright as Americans and our duty as lawyers.

The Conference on Administrative Procedure:

Report on the Second Plenary Session

by Patricia H. Collins • Secretary of the Section of Administrative Law

▪ Moving into concrete proposals for the improvement of the handling of the business of the Government of the United States, the President's Conference on Administrative Procedure, in its second plenary meeting, in Washington on November 23-24, has produced the first justification of its appointment.

The Conference approved twenty recommendations which are directed to the President, to the Judicial Conference of the United States and to the administrative agencies. The agency recommendations are not designed for universal and uniform adoption but for selection by each agency of such of the items approved and adopted as may best contribute to the reduction of delay and expense or volume of record, incident to the agency's particular type of adjudicatory or rule-making proceedings.

The Chief Justice of the United States, Earl Warren, was in attendance at the opening session and addressed the meeting briefly. He expressed a deep interest in the work undertaken and in the course of his remarks alluded to his experiences with the administrative agencies while serving as Governor of California. He said:

> . . . I have some little experience with this in a very minor way, of course. When I became governor of my state in 1943, we had a very large number of administrative agencies, many of them recently constituted, that were attempting to judge, through the administrative processes, the action, the conduct and the affairs of people.
>
> Having had the privilege of being Attorney General of my state before I became governor, I had come to the conclusion that many of the proceedings that were going to our courts eventually were little more than kangaroo courts, and that something of necessity had to be done in order to remedy the situation.
>
> With the help of our judicial council in our state and the legislature, both of which made exhaustive studies of the situation, we were able to establish a section of administrative procedure in our state government. We were enabled to provide an orderly procedure for all of our administrative agencies. We were able to establish a code of ethics for the guidance of all the hearing officers in our state. I am sure that what has been a very burdensome problem to our supreme and our appellate courts was very greatly diminished.

The Chief Justice emphasized the importance of the work of the Conference and offered his personal cooperation. He said:

> I cannot help thinking of the great necessity for work of this kind when we realize that in some of the judicial districts in our country it takes over four years to get an ordinary civil case to trial. To me that is unconscionable. It constitutes a denial of justice to a great many people and anything that we can do to facilitate the administration of justice and make it possible for our courts to review the administrative process in a reasonable length of time, that is an objective greatly to be desired.

Conference Recommendation No. 1 expressed the prevailing sense of the Conference. It stated, "The Conference recommends that every agency consider unnecessary delay, expense, and volume of record in adjudicatory and rule-making proceedings to be detrimental to the public interest."

General Recommendation No. 2, introduced by George J. Bott, General Counsel of the National Labor Relations Board, stated that: "The Conference recommends that every agency having adjudicatory or rule-making functions make a comprehensive and intensive study of its own procedure in order to discover and eliminate any unnecessary delay, expense or volume of record which may presently occur in its proceedings." Mr. Bott described this recommendation as a "catalyst" to further action in the agencies. Further, in his supporting statement he said:

> This resolution is designed to bring to bear all of the forces at our command on this problem of delay and long records and expense in an interim procedure.
>
> In the National Labor Relations Board, we have had some experience along this line, and I am sure the rest of you have, too. We set up a committee over two years ago to study all of our procedures from top to

bottom with the theme in mind, with the text that nothing in the agency operationally was sacred.

Two years ago, for example, it took over 220 days in a litigated case from the beginning of the investigation to the joinder of issues at the trial. Today it takes 55 days.

About two years ago, it took a year and a half for a case to reach a decision by the Board. Today, it takes about 225 days. The time has been cut by over 50 per cent.

Recommendation No. 3 recommends to the agencies a rule for prehearing conferences in administrative hearings. The proposed rule adheres closely to Rule 16 of the Rules of Civil Procedure but it is tailored to serve the purposes of the administrative agency which has protracted hearings. Recommendation No. 4 is allied with No. 3. It recommends that agencies encourage hearing officers to call and conduct prehearing and other conferences.

No. 5 recommends that the agencies require precision in the statement of the issues which are to be adjudicated in order that hearing officers may proceed promptly to conduct the hearing on relevant matters only.

Recommendation No. 6 relates to admission of documentary evidence in advance and recommends that the agencies require such evidence to be submitted sufficiently in advance of hearings for preparation of cross examination and rebuttal evidence.

Under Recommendation No. 7, the Conference recommends that the agencies grant broad authority to hearing officers to rule upon interlocutory matters which arise during the course of the hearing.

Recommendations Nos. 8, 9 and 10 are directed to the Judicial Conference of the United States. No. 8 recommends that the United States Courts of Appeals be urged to adopt a rule that will permit, in the absence of a contrary statute, agreements by the parties for shortening the record. This would be accomplished by encompassing only that part of the record before the agency which is necessary to enable the court to pass upon the issues raised by the appeal. Recommendation No. 9 is a proposed uniform court rule to permit the filing of briefs prior to the designation and printing of a joint printed appendix. The joint printed appendix would contain matters of record relied upon by the petitioner or petitioners and the respondent agency in their briefs. Responsibility for the printing would be upon the petitioner. Recommendation No. 10 urges the courts to encourage hearing officers and agencies to exclude irrelevant, immaterial and repetitious evidence.

Recommendation No. 11 for the creation of an Office of Administrative Procedure evoked a discussion which took up nearly half of the two-day session. The question as to the desirability of such an office had been placed before the Conference by Attorney General Herbert Brownell, Jr., in his address at the opening session. The creation of such an office was strongly recommended by a Conference Committee of which John A. Danaher, Judge of United States Court of Appeals for the District of Columbia Circuit, was chairman. The committee recommended that such an office be established in the Department of Justice, that it consist of a Director and a small staff, that the Director be appointed for an indefinite term, and that he be empowered to obtain information from the federal agencies. Generally, it would be the function of the office to make continuous studies looking to the improvement of federal administrative procedures. The committee was emphatic in its report that the office should not be given power to dictate procedures, but should be limited to study and recommendation.

The principal discussion of the recommendation revolved around the issue of whether the Conference should recommend the transfer to such an office, if established, of the functions with respect to the appointment, compensation and tenure of hearing examiners now performed by the Civil Service Commission. The majority of the reporting Committee were against such a transfer. They contended that while the handling of hearing examiners required improvement, the new heads of the Commission should have an opportunity to do the job, that the transfer of such functions to the Administrative Procedure Office at its inception might absorb all of its energies and would involve duplication of field and other facilities of the Commission. They thought that the mere proposal to transfer such functions might substantially defer the establishment of any such Office.

One of the members of the committee, Earl Cox, a hearing examiner with the Federal Trade Commission, while concurring with the majority that an Office of Administrative Procedure would be desirable, urged that it be established as an independent agency and that there be transferred to it the functions with respect to hearing examiners now carried on by the Civil Service Commission. Karl Loos, Solicitor of the Department of Agriculture, also a member of the Committee, stated that while he agreed with Mr. Cox, he supported the majority recommendation in the hope that by putting aside the controversial hearing examiner questions such an office could be established in the near future. The majority's recommendation was opposed by Earl W. Kintner, General Counsel of the Federal Trade Commission, and Chairman of the Conference Committee on Hearing Officers, and by Wilbur R. Lester, a practicing lawyer member of the Conference and a member of the same committee. They contended that the creation of an Office of Administrative Procedure was premature in view of the activities of the Conference. They said that any recomendation as to the functions and composition of such an office should await the report and recommendations of the Conference Committee on Hearing Officers.

The debate brought out the value of the work done by the Administrative Office of the United States Courts and the need for similar continuous effort to improve administrative procedures. It was suggested: "Make this a 24-hour-a-day job, 365

days a year, then we will have the material with which we can deal and deal promptly."

The recommendation was supported by Robert W. Ginnane, delegate from the Department of Justice, who referred to the excellent work for the improvement of judicial procedures which has been done by state judicial councils, and to the conclusion of the American Bar Association's Section of Judicial Administration that effective work by a judicial council must be based upon continuous staff studies. He said that the Conference is presently concerned with problems which had been identified by the Attorney General's Committee on Administrative Procedure in 1941 and on which nothing had been done in the intervening twelve years in the absence of such continuous effort.

After the defeat of a motion by Mr. Kintner to table the office recommendation until the next plenary session of the Conference, the recommendation was taken up section by section for amendment. The principal amendment adopted was to delete a provision which contemplated that the Director of such an office would initiate a co-operative effort of the Civil Service Commission and the federal agencies employing hearing examiners to improve the administration of Section 11 of the Administrative Procedure Act, with particular reference to the following conditions: the Commission's present use of a hearing examiner register which was closed in July, 1949, delay in the administration of hearing examiner promotions, failure of both the Commission and the agencies to assume responsibility for the efficiency of examiners, and the absence of any regular procedure by which the Commission obtains the advice of the agencies and the practicing Bar. The provision was deleted on the motion of Mr. Cox, who urged that the Conference should make no recommendations relating to hearing examiners in advance of the recommendations and report of the Committee on Hearing Examiners. He pointed out, however, that the Civil Service Commission remained free to act upon the committee's suggestions.

Concluding an instructive and lively debate, the recommendation for the creation of an Office of Administrative Procedure, as amended by the Conference, was adopted by a substantial voice vote, and will be transmitted to the President.

Recommendation No. 12 is directed to the agencies and recommends that they require their counsel to prepare adequate trial briefs in advance of hearings.

Under Recommendation No. 13 it is recommended that in any formal proceeding in which it is anticipated that the record will exceed 2500 pages, provision be made for a daily or current index of the record which will be available to the hearing officer and to all counsel. This recommendation received the enthusiastic support of the Chairman of the Conference who stepped down from the chair for the purpose of personally supporting it.

Recommendation No. 14 is directed to the agencies and recommends that they define the status of agency counsel by a rule which would clarify the extent of counsel's authority. Recommendations 16 and 17 likewise relate to agency counsel. Number 16 recommends that detailed attorney's manuals be maintained for the guidance of agency counsel. No. 17 recommends that the agencies establish in-service training for their agency counsel.

Recommendation No. 15 deals with excerpts from documentary evidence and recommends that the agencies adopt a rule to the effect that when portions only of a document are to be relied upon, those portions shall be excerpted and offered as evidence, together with a statement indicating the purpose for which the excerpts are being offered to the hearing examiner and to other parties, thus cutting down the bulk of material to be received in the record.

Recommendations 18, 19 and 20 are directed to the agencies and recommend respectively that a practice manual of an advisory nature be published for the use of practitioners before the agencies and that the agencies co-operate with universities and local or national bar associations which are undertaking to conduct practicing lawyers' institutes. The last of the recommendations approved and adopted by the Conference urges the agencies to sponsor and conduct informal meetings or conferences between agency officials and agency Bars as an exercise of good public relations.

The Conference adopted three new subjects for study. Each of these subjects, like the subjects presently under study by the Conference, suggests a possibility for improving administrative procedures. The subjects are (1) that the Conference consider some manner of requiring in rule-making proceedings that participants be identified prior to the hearing; (2) that the Conference make a study of the cost of transcript in administrative proceedings; and (3) that the Conference make an examination of the status of examiner's reports submitted for agency review.

The suggestions, comments and criticisms by bar associations and other interested organizations on the recommendations adopted by the Conference have been invited. A resolution directed that the First Report be given wide circulation to the end that the Conference be apprised of all "suggested means and methods designed for the improvement of administrative processes".

In his closing remarks to the assembled delegates at the fall session of the Conference, Chairman E. Barrett Prettyman expressed his satisfaction with the session's accomplishment "in which we can have a great deal of pride, because I think it will lead to great things satisfactory to the agencies, the Bar and the general public. It is a constructive step in good government, in my judgment."

The entire Conference was reported and copies of the transcript are obtainable from Ward & Paul, Official Reporters, 1760 Pennsylvania Avenue, N. W., Washington, D. C. The price is $40.00.

AMERICAN BAR ASSOCIATION

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Signed Articles
As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

■ *Apathy: The Enemy of Legal Aid*

Amid the general optimism at the Diamond Jubilee Meeting in Boston, Mr. William T. Gossett, General Counsel of the Ford Motor Company, felt constrained by genuine emotion to say "But the great majority of our colleagues at the Bar are hopelessly apathetic about this whole [Legal Aid] movement." His short address at the joint Legal Aid-Lawyer Referral Service luncheon in Boston is notable in so many aspects that it is published in full in this issue.

When we realize that many large cities even today have no Legal Aid and when we recall that recently a bar association dubbed the Lawyer Referral Service as "socialization of the profession", we cannot lightly dismiss this charge of apathy which in turn leads to misunderstanding based on ignorance.

This address deserves close attention because so much of importance has been compressed into so few words. Mr. Gossett knows whereof he speaks because he has rendered yeoman service as a member of the Association's Standing Committee on Legal Aid Work and as a director of the National Legal Aid Association.

■ *The Priceless Ingredient*

Edmund Burke once described a lawyer thus:

> He was bred to the law, which is, in my opinion, one of the first and noblest of human sciences; a science which does more to quicken and invigorate the understanding, than all the other kinds of learning put together; but it is not apt, except in persons very happily born, to open and to liberalize the mind exactly in the same proportion.

Holmes, with characteristic brevity, paraphrased Burke by saying that the law sharpens the mind by narrowing it. Perhaps this led him to his famous division of able lawyers into "kitchen knives, razors and stings". All of these concepts emphasize the sharp aspects of the lawyer's mind. Yet able lawyers instinctively rebel at being called sharp practitioners. The distinction is worth examining.

The sharpness of his intellect is one of the lawyer's outstanding qualities—yet it is not the most essential. The desire to win his case, the urge to please his client, the temptation to curry the favor of the wealthy and powerful, all appeal to the sharp facets of the legal intellect. The clever move, the intentional omission, the smart statement of partial truth may swell his fee but will decrease the character and reputation of the lawyer who uses such crafty tactics. "Clever men are good," observed Carlyle, "but they are not the best." Calculating shrewdness alone does not make a great lawyer.

Many moments occur in practice where a lawyer must make quick decisions, decisions which are based solely on his code of honor. In those moments, it is the deeper qualities of the man which govern his judgment. Those qualities are mental; they are also moral. A lawyer needs more than a sharp mind, a narrow, pointed professionalism, at such trying times. In these crises he needs a Lincoln-like sense of right which has not been blunted by its contact with our workaday world. While he must practice law in the world of men, the lawyer need not apply the ethics of the market place. Truth is truth, right is right, and it takes more than a sharp mind to disprove the fact.

Life is wider than the law—and deeper. Tricky strategy may win occasional victories, but it does not win respect and lasting esteem from either colleague or client. Trust is not earned by cleverness. Honesty with the able lawyer is not a policy; it is an essential part of the fiber and core of his inner being. Candor is his hallmark; kindness his passport to all strata of men. His sense of right is his shield; fearless self-reliance, his sword. Perhaps it was such thoughts as these that led a friend to tell young Elihu Root that "a lawyer needs twice as much religion as a minister".

The priceless ingredient of the lawyer is not his sharp mind, his shrewdness or his cleverness. The priceless ingredient of the lawyer's character is his integrity.

■ *Use or Abuse? We Must Help Make the Choice*

We are proud to present in the pages of this issue two treatments of the burning question of the proper function and conduct of legislative investigations. Many people are so incensed at what they conceive to be the harm done to innocent people by self-seeking demagogues that they offer intemperate vituperation instead of constructive criticism. They are prone to say that Congress should confine its investigations to matters which come within its function as law-maker, forgetting what Mr. Keele recalls to our minds in his "Note on Congressional Investigations", on page 154, —namely, that Woodrow Wilson and Bagehot and Bryce have stressed the informing function of the legislature.

Mr. Garrison, on page 125, points out that we are talking of an impossibility when we glibly suggest the cure-all of affording the people the same rights in connection with legislative investigations that they enjoy in courts of law. We may well heed the restrained words of those who see the good in the institution and of those among them who seek to preserve the power of the institution but have suggestions for its improvement.

Our duty as lawyers to follow the example of these able thinkers is clear. We must avert the menace of abuse of the legislative function by devising some means of channeling it in a course where it will not overwhelm the ancient liberties of the people. Once again the American lawyer must lead in interpreting to the electorate the elements of strength and weakness in a governmental contrivance. We have an informing function of our own.

The Chief Justice on Legal Aid

■ At the annual dinner of the National Legal Aid Association in Washington, on Friday, October 30, Mr. Justice Frankfurter spoke and read a letter from the Chief Justice who had been invited to attend. The Chief Justice's letter is reprinted here:

Mr. Justice Frankfurter was good enough to agree to convey my regrets for being unable to be with you this evening, and also to express my appreciation for the manner in which you and all who are engaged in legal aid work are serving the cause of American justice.

I would like to be with you personally this evening and would be but for the fact I am attending an official dinner given by the King and Queen of Greece.

Legal aid work and the kindred service in the field of criminal law made available through the Office of Public Defender have been very close to me through the years. Over thirty years ago, I joined with other members of the Bar to establish Legal Aid Associations throughout California. We took the cases in rotation ourselves until such time as the new Associations could be properly housed, staffed and financed. Since that time, they have gone a long way and have filled what was theretofore a great void in the administration of justice.

Only a short time thereafter, I urged the free holders to include in the new charter of our county a provision for a public defender to represent necessitous defendants charged with crime. I then had the very satisfying experience as District Attorney of working for ten years with the Public Defender. His office eliminated much of the sordidness that prevailed around the police courts, and because of his fair mindedness and public spirited attitude, it was possible to do many things for the rehabilitation of prisoners that could not otherwise have been done.

The public defender system in California has grown extensively since those days, and I am hopeful it will continue to grow there and throughout the Nation. It has been my experience that wherever the manner of selection and tenure have been sound, and where care has been taken in selecting personnel, the Public Defender's Office has been a beneficent governmental agency in all respects consistent with an orderly and respected administration of criminal justice.

Throughout the years, I have thought how fortunate is the judge who has a virile Legal Aid Association and an honest and understanding Public Defender in his community. What a satisfaction it must be for him to know that adequate legal advice and representation are available to the poorest citizen in his jurisdiction. What a comfort it must be for him to be sure there is no price tag on justice in his court.

In my very brief time on the bench that feeling has been intensified.

I wish you continued success in your great humanitarian work.

Sincerely,

EARL WARREN

Lawyers of Ten Southern States and House of Delegates

To Gather in Atlanta, Georgia, March 3-9

■ More than 1500 leading lawyers, judges and law teachers from Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Tennessee and Kentucky, together with approximately 300 American Bar Association officers and delegates from fifty-two states and territories, will form, at the Atlanta Biltmore Hotel, March 3-9, the greatest and most significant gathering of the legal profession ever held in the South.

Members and nonmembers of the American Bar Association will be equally welcome. Wives will turn out in large numbers to give a distinct social flavor to the gathering. Courts are being asked to adjourn to permit the fullest possible attendance.

President Jameson will preside at the sessions of the Regional Meeting and the Board of Governors, March 3-6, and Chairman Maxwell will preside at the sessions of the House of Delegates, March 8-9.

Under the leadership of Honorary Co-Chairmen Robert B. Troutman, Hatton Lovejoy and John B. Harris, and General Chairman E. Smythe Gambrell, the program is rapidly taking shape as a happy balance of education, inspiration and entertainment. "Southern hospitality" will be at its best. Sparkling receptions given by the Lawyers' Club of Atlanta, the Atlanta Bar Association, and the Georgia Bar Association will be memorable social events on Wednesday, Thursday and Sunday evenings. Institutes and seminars conducted by the American Bar Association Sections of Administrative Law; Bar Activities; Corporation, Banking and Business Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Mineral Law; Municipal Law; Real Property, Probate and Trust Law; Taxation and by the Junior Bar Conference, will provide lawyers young and old with up-to-the-minute briefing on the ever-growing body of the law. Representatives of the executive, judicial and legislative branches of the national and state governments and of leading bar organizations will be featured speakers at numerous assembly sessions, breakfasts, luncheons and the main banquet.

A special program will be the trial techniques demonstration on Friday afternoon and Saturday morning under the leadership of Clifford W. Gardner, former President of the Minnesota Bar Association, and a group of trial judges and other experts selected from the country at large.

Special sessions will be held on legal aid, lawyer referral and legal assistance to members of the Armed Services; the Conference of Bar Presidents and Conference of Bar Secretaries will have their sessions, and the American Judicature Society will have its special breakfast. Various law alumni groups will have their separate luncheons. Numerous other groups will hold meetings.

State Delegates, state bar presidents and other officials constitute the Advisory Committee. President Edward A. Dutton of the Georgia Bar Association, President A. Walton Nall of the Atlanta Bar Association and President Edward D. Smith of the Atlanta Lawyers' Club are Co-Chairmen of the Reception Committee. Other chairmen are M. E. Kilpatrick, Distinguished Guests Committee; William B. Spann, Jr., Registration and Hotel Accommodations Committee; John H. Bowman, Jr., Breakfasts, Luncheons and Banquet Committee; W. Neal Baird, Continuing Legal Education Committee; G. Arthur Howell, Sightseeing and Outside Entertainment Committee; C. Baxter Jones, Jr., Junior Bar Activities Committee; and Mrs. Allen Lockerman, Ladies' Entertainment Committee.

The program begins with a Grand Reception on Wednesday, March 3, 5 to 7:00 P.M. and the Assembly convenes Thursday morning at 9:30 o'clock. Governor Herman E. Talmadge and local bar officials will deliver addresses of welcome, and responses will be made by President Jameson and other leaders of the Bar. During the week's program the intellectual and other serious work will be interspersed with a continuing round of entertainment, including in addition to the three major receptions, numerous breakfasts, luncheons and the main banquet, and such diversions as sightseeing trips to the Cyclorama, Stone Mountain, Emory University, Georgia Institute of Technology, north side homes and other attractions.

The committee in charge expects to stress fellowship, and one evening will be set aside for the informal entertainment of all visiting lawyers and their ladies in the homes or clubs of Atlanta members of the Bar.

Headquarters will be maintained at the Atlanta Biltmore Hotel, where all meetings will be held. Advance registrations are being solicited, and hotel rooms will be reserved and assigned in the order of registration.

Social Security:

The Trojan Horse Inside Our Walls

by George E. Morton • of the Wisconsin Bar (Milwaukee)

■ The question of extending the coverage of the Social Security Act so as to include lawyers and other self-employed citizens is one of the most pressing now under consideration. Mr. Morton writes in vehement opposition to social security. His article is a reply to Harold O. Love's "Social Security and Retirement Plan for Lawyers: It Need Not Mean Socialism", which was printed in the June, 1952, issue of the *Journal*. Mr. Love proposed a twofold program: (1) amplifying and extending the present social security legislation to provide a unified federal system in order to provide a unified adequate minimum protection for all against socially created risks; and (2) establishing legislation that would encourage the individual to set up for himself a tax deductible program that would afford him a decent standard of living upon retirement.

■ The lawyers of the nation, of all citizens, should have been shocked by the article in the June, 1952, issue of the AMERICAN BAR ASSOCIATION JOURNAL, "Social Security and Retirement Plan for Lawyers: It Need Not Mean Socialism", by Harold O. Love, and what he advocated. Any lawyer who was not shocked by it, in my humble opinion, either did not read it, or had not given any adequate consideration to the question of whether our national social security law, and such a program of its extension to cover *all* citizens as he advocated, is consistent with maintaining our Constitution and the liberties guaranteed by it.

Mr. Love claims that "the majority" of the people in the United States believe that such a security program as he presented is: *"in accord with the traditions of democracy and individual enterprise which we have always cherished,* and that it is the fundamental obligation of society, under the present economic system, to provide security against socially created risks".

All that I can say is that if the "great majority" do feel as he claims, and really believe that it is "in accord with the traditions of democracy and individual enterprise which we have always cherished", it is only because of the widespread and disheartening ignorance of history and of the fundamental principles on which our Constitution and economic life are founded. Those principles must be maintained if individual freedom, the most precious element of the American way of life, is to remain.

Further, our traditions are not those of a "democracy", which is the very system the founding fathers aimed to avoid, and did avoid. They founded a *republic* under a Constitution which guarantees a republican form of government to every state in the Union. That Constitution is the supreme law of the land. It limits and controls the power both of "the people" and of their representatives, and prevents them from doing anything that violates the rights and liberties guaranteed by it to individuals or minorities.

It is true that the people in some of their local governments act in a "democratic" way, but that does not make the state or the nation a "democracy". The use of that word to describe our government only creates confusion in the reasoning of the people and in their conception of the kind of government we have, and also helps to destroy their respect for and confidence in the very foundation of their liberties—the Constitution. Nowhere in the Constitution is the word "democracy" used. It is even used by the Communists to describe their system. (See the book, *The Key to Peace*—Clarence Manion.)

However, the republic still stands, —so long as the Constitution stands—except as it is allowed to be undermined by "public welfare" laws such as "social security", wage, price, public housing and rent controls, and by the administrative agencies of government, to which are given the *three great powers of government in defiance* of the basic

theory of the Constitution, viz: balances of power against power.

And in carrying out the various welfare laws, government agents and agencies, though believing themselves to be loyal citizens, are acting like the Greek enemies of ancient Troy in the Trojan War, who concealed themselves within a great wooden horse called the "Trojan Horse", placed by the Greeks outside the walls of Troy, while the army retired to the ships. The Trojans, deceived by the pretended retreat and relying on the statement of a pretended-traitor Greek, who suggested it *was for their benefit,* hauled it within their gates. And while the citizens and defenders of Troy slept (as millions of our citizens are now sleeping in the face of the welfare assault upon their cherished liberties) the Greek "traitor" released the enemies within the horse. They then opened the gates of the city to the returning Greek army, who came in and captured and burned the city.

In the United States, however, the Trojan Horse enemies "within the walls" of the Constitution, have not been recognized as such, because instead of attacking any citizen, they have made themselves appear to be loyal and sympathetic friends, and to be acting lawfully and only for their welfare. And as in ancient Troy, their protestations of public welfare have been believed and acted on.

And for nearly twenty years, these real but unrecognized enemies of our Constitution, concealed within the Public Welfare Trojan Horse, have been coming out and proclaiming themselves to be the only loyal friends of the common man. And by so doing they have made millions of citizens, especially workingmen, believe them and through nation-wide unions the workingmen have become political slaves to their leaders. These enemies now threaten to increase and make permanent their power, and make subject to it, always to a greater degree, the liberties of nonunion as well as union co-employees, and of people generally, just as they did in Germany under Hitler's leadership. And they have been aided in their seizure of power and its growth, by the United States Supreme Court, whose interpretations of the Constitution, especially in interstate commerce, labor and social security welfare cases, have helped to undermine and destroy much of its plain original meaning.

Our progress toward socialism ever since the enactment of the national social security law in 1935, and toward destruction of our American liberties, has been startling to me. I have always been a vigorous opponent of the law, even before it was enacted in 1935. In 1936 nearly half of the voters opposed it in the national campaign. It was my conviction that such a law and the proclaimed furnishing of economic "security" by the government to working classes of citizens, must inevitably be extended to cover *all the people,* just as Mr. Love advocates, and that it would ultimately create a planning government—a socialist or master state—and destroy our constitutional government and all our liberties guaranteed by it.

The book, *Relief and Security,* published by Brookings Institute, Washington, after reviewing the relief systems of the world, condemned our system of social security as follows (page 762):

> Danger of demoralization, pauperization, and corruption of the electorate appear so great that from our point of view *nationalization of the functions of relief and social security has to be rejected as a device.*

They hold, very correctly, that this is the function of the states, but declare that "grants-in-aid" should be given by the Federal Government to needy states (page 763):

> . . . to insure that no person of the country shall be in want without being eligible for such benefits *as may be necessary to relieve that want. We are speaking here of a minimum benefit necessary to prevent want, and not a benefit sufficient* to enable the beneficiary to live according to some higher level [Italics added].

They did not seem to realize that grants-in-aid mean a large degree of government control, a control which I believe wrong in principle and which leads to the very system sought to be avoided by them. Our Supreme Court has held that what the government subsidizes it can regulate.

It seems clear that if constitutional government is to be saved, the national social security law, if not declared unconstitutional by another decision, must be repealed; *returning to and leaving with the states and local authorities the sole responsibility* for the relief of their citizens in cases of want and need, and according to the need, as determined by such local authorities, *with no supervision whatever* by the Federal Government or any of its agencies.

There is almost universal recognition of our trend in the past twenty years toward an all-powerful, if not socialistic, national government, whose acts, national and international (through the United Nations), already dominate states, individuals, industry and business, and directly and indirectly threaten, if not override, the Constitution itself. And the National Government, by its crushing taxes, tyranny over industry by its administrative agencies, competition with private business by its many government-created and controlled business corporations, by interstate commerce, public welfare, and labor laws, with the right claimed by labor unions to dominate employers with nation-wide strikes, picketing with violence, all seriously threaten private business and free enterprise, *upon whose life and our Constitution, all our liberties depend.*

And the claim is now seriously made, that a treaty (the United Nations Charter) is supreme law above our Constitution, when in conflict with it. This was claimed even by our Secretary of State, Mr. Dulles. In a speech he made at Louisville on April 12, 1952, as reported by a Senate Committee, he said, "treaty law can override the Constitution".

In my belief, the American Bar Association, in its own interests, as well as in the interests of lawyers generally, should not ignore the undermining of the Constitution,

but should take vigorous action to make the Constitution the supreme law. (See, *Which Way America?*, by Fred A. Wirt, Industrial Management Institute, Carroll College, Waukesha, Wisconsin; "Is Our Constitution Doomed?", William LaVarre, *American Legion Magazine*, September 12, 1952.)

The condemnation of our Social Security system by the Brookings Institute is strongly supported by the books, *Social Insurance and Economic Security*, and later on, *Social Security*, written by Dr. Edward H. Ochsner, of Chicago, one of its most highly respected doctors. He went to Germany in 1894 after college and medical degrees, and because of his ability to speak German fluently, was allowed to practice there under their social security system, originated by Bismarck, upon which ours is patterned. After eighteen months of that experience, he came home and later wrote those books. Anyone who believes in social security should read those books; also *Socialism in Germany* by Howe, and *Mein Kampf*—Hitler's triumph of the Socialist Labor State,—and see what socialism did to Germany.*

Then came the bill of Senator Lodge to bring lawyers within the provisions of this law, upon their individual application. The Wisconsin Bar Association pronounced against this proposal but at their annual meeting at Elkhart Lake in June, 1952, they appointed a committee to consider it and report, and on my motion, requested the committee to consider the entire national social security law. No report has yet been made.

I hope that I can help to wake up the lawyers of the nation, as I have been trying to do for many years, to the danger of a master-state tyranny, and to the fact that if lawyers are once caught in this totalitarian trap, the preservation of the rights and liberties of the American people, under constitutional government, is well nigh hopeless.

The conclusion of the Brookings Institute, above quoted, was based on the wide difference in living conditions and in human needs in the different sections of the nation, caused by climate, productivity and cost of the necessities of life. No general law of Congress can fix a just and fair tax rate for all citizens of the nation, or the amount of benefit or pension to be paid, which can be adjusted to the needs of people in the different sections. Even the needs of city and country life are widely different. It is innately a local problem.

The fact is that social security is not now and never was designed in spite of its false name of "security", to meet those real needs. Those in *real need* have to go to the local authorities for relief, the same as the needy have always done. In Milwaukee, there were in the summer of 1952 four needy families with six or seven children, who each got between $300 and $350 per month for support. One thousand six hundred four families got an average of $125.83 each. This is as I was informed by the head of the local relief board.

The "social security" of the National Government, for real security of living in time of want or need, *and as insurance* for payment of which the tax is the premium, is the greatest fraud that was ever perpetrated on a free people in the history of the world. No government ever supported its people and left them free. It will not in the United States, and as an economic security it is nothing it pretends to be. In addition, it is serving and has served to undermine and destroy the morale and courage of the individual citizen to provide for his own future, and that of his family, by his own efforts, earnings, savings and resources, traditional in American history—the American way. It teaches all citizens to look to the national government and make respectable what was formerly pauperism.

Government "social security" was designed and has accomplished the result of making a merely partial or token support by the government at the age of 65 and over, respectable for rich as well as poor, because past employment qualifies both of them to ask and receive it as a legal right regardless of need. And today, rich men, who have no need whatever of its benefits, like the ancient noble Piso of Roman history, are receiving "social security" pensions in addition to any income (not wages) which they get, *regardless of the amount*, even if $1,000 per month. In contrast, a wage earner above 65 who continues to earn more than $75 per month *forfeits* his "social security" pension. He either has to live the life of a semiloafer, or forfeit his pension from the Government. The

*In February, 1940, I made a minority report to the Milwaukee Republican Forum, in which among other things I said:

1. Government support of the citizen is a complete subversion of our former political philosophy of the relation between the citizen and the national government.

2. Theretofore, the theory was that the citizen should support the Government so that it could protect him and perform only public functions of some kind, while he supported himself. Pensions as a reward for services performed for the nation in time of war and, in some instances, pensions for retired officials or servants of the government, as in the Postal Department, are a clear exception to the rule. . . .

3. It is not even supposed to [provide] sufficient support at the present time for those it is designed to benefit. The inevitable result will be that the benefits under the law will be extended and increased, doubtless doubled, if not more, and taxes will have to be wrung from the people to pay the benefits promised.

4. It is one more step in developing a national power that will ultimately override all state power whatsoever, and tends further to destroy the balance between national power and state power upon which the very life of constitutional government was founded and upon which it must depend for existence.

5. It is one great forward step in the complete regimentation of all the people of the United States, directly and indirectly under national control at Washington. It tags and numbers all employees, and dogs their footsteps from job to job, and place to place, during their lives until sixty-five (65) years of age, and subjects them and their employers to an army of snoopers and spies to ferret out and detect violators of the law in order that its revenues may be collected and the system universally acknowledged.

6. For the first time, with unimportant exceptions, the people of the United States are given a direct financial interest in their ballot, and the inevitable result will be that only those legislators will be of influence among the people hereafter who will promise them the greatest benefits through their services by voting increasing rights and benefits.

7. It is absolutely inimicable to the whole system of constitutional government, in that it encourages an increasing regimentation of the people and an increasing support of the people by the Government until there will be left insufficient private industry and private property to support the cost, upon which the only alternative will be for the government to take over all business and operate it under some totalitarian system of government.

only ones who can live on "social security" are those who have resources besides allowed earnings, or who have family "support".

And the progress of inevitable amendments with increased, if not doubled, benefits to adjust them to the inflation of our currency, or for other political reasons, and the progress of the nation toward extending the law to cover all citizens has been made plain not only by the amendments which have been made, but by others constantly proposed, just as I predicted over thirteen years ago. And unless there is a great awakening of the people to the danger of the crushing burden of this system upon both individuals and industries in the not too-distant future, it will result in a burden of taxation of wealth, business and industry *which they cannot meet*. The result should be plain to anyone—government will take over and a Socialist government will be established.

That tragic result will be greatly assisted also by the making of laws for "public welfare" under the welfare clause of the Constitution, and also by laws based upon the regulation of interstate commerce *already interpreted to cover the greater portion of business and industry*. Even a farmer in Ohio was penalized because he planted more acres of wheat than was ordered by the Government. (317 U.S. 111). And to these must be added the creation of national administrative agencies given all of the three great powers of government, in defiance of the fundamental theory of our Constitution requiring their separation and balances of power deemed vital to liberty.

But we must add to our national problems the national program of taking prosperity to other nations of the world, *even by deficit financing in this country*, subsidizing and supporting their failing economies for the purpose of keeping them from becoming subject to the Kremlin.

One thing seems very clear. Either this nation, so far as possible, must return to the fundamental principles on which free government was founded in 1787, or our liberties, guaranteed by our Constitution, will disappear, just as they did in France in the French Revolution, in Germany under Hitler, in Italy under Mussolini, and in Russia under Lenin and Stalin. With them "public welfare" was the road to tyranny. With us, to maintain our freedom,—hard work, earnings, savings invested in business, with new inventions, seem the main hope now.

In addition to a return to sound constitutional principles internally, we must avoid international obligations, which in themselves would help to destroy, if not destroy, our liberties, as we have done under the United Nations. No one representing this nation should ever have been allowed to sign and in our behalf, vote for the adoption of the *communistic Declaration of Human Rights*, adopted by that body on December 10, 1948, a declaration which is impossible of interpretation except by an absolute tyrant. For proof of this, all one needs to do is to read it. And it was signed in our behalf, as a world treaty. It seems clear that it will not, however, be ratified by the Senate. Its communistic nature is disclosed in clauses too many and too long to quote.

To illustrate its nature, however, I shall quote some of the rights declared to be rights of every person in the world—and that the same are to be realized by them—*"through national effort and international co-operation"*. These *"rights of every person in the world"*, include:

> . . . social and cultural rights indispensable for his *dignity and the free development of his personality. . . . The right to rest and leisure, with periodic holidays, with pay.*
>
> *Everyone* has the right to a *standard of living adequate for the health and well being of himself and his family*, including food, clothing, housing, and medical care and *necessary social services, and rights to security* in the event of unemployment, sickness, disability, widowhood, *old age, or other* lack of livelihood in circumstances beyond his control. (Italics mine.)

Russia refused to sign, yet it imposes the duty on the United States, to "co-operate" in having these proclaimed rights *"realized" by every person in the world, even though behind the Iron Curtain*, a practical declaration of war against Russia also. Such action by our representatives was in absolute disregard of our Constitution and the rights of citizens under it, sufficient for any real American.

This Declaration of the United Nations further provides:—

> Art. 28. Everyone is entitled to a social and international order in which the *rights and freedom set forth in this declaration can be fully realized.*

If American lawyers allow themselves, step by step, to be swallowed up by this world communist octopus, as is now proposed on their application, how can it be expected that our own nation can escape socialism, if not communism? And that too by the consent of lawyers, *the citizens who above all others object to the tyranny of government.*

Education of both youth and adults is the only answer, and that is the *primary burden* of lawyers. There is almost no other class of citizens, besides lawyers and professors of the law, who have the basic education in constitutional government and are able to educate the people on this subject. Education must therefore come principally from them.

What has become of all the courage of the Pilgrims and of the pioneers, braving the ocean, and later, in covered wagons, plodding through a wilderness infested with savage Indians, as well as wild beasts?

Who guaranteed their future? No one. And they never dreamed of asking it. They only sought the personal liberty to provide for their own future. They had the courage to make *and be satisfied* with the security they made for themselves individually. That is the American way. It was inherited by the citizens of today, but the great mass seems disposed to entirely abandon it in favor of an *economic policy condemned by both logic and history.*

"Social security" by government aid is an *ignis fatuus* which no real American should be willing to have

the national government dangle before the people, to *lead them to the slavery of a supporting and all powerful government.* Benjamin Franklin said in 1755, "They that can give up essential liberty to attain a little temporary safety, *deserve neither Liberty nor Safety.*"

In a Virginia convention, a great American hero shouted "Give me Liberty or Give me Death", since echoed in every schoolroom and college in the nation; but nowadays, Americans en masse, *are pleading to government,* "Gimme security, and I'll consent to any laws which confiscate my money, you claim necessary to pay not only for the 'security', but for the salaries of your agents who collect and spend every dime of the money, instead of saving it for my old age. And if I ever live to be 65 they will collect it again from other citizens." That is called "Social Gains" and "Progress". To what end?

Oh Bismarck! What an attractive example you set for a free people, such as ours, who did not even take the pains to learn what that policy did to Germany, with England's Socialism as a tragic warning. If lawyers join the "gimmes", education is hopeless and except for some miracle, Socialism or Hitlerism has a future in the United States.

Do we want "security" on those terms? For one, whose whole life from boyhood to the middle eighties has been one of hard work—I say "No!" No workingman of any kind who thinks it through would vote to make himself, both in fact and law, a slave to government. Instead, let us try to keep this nation in fact—"the land of the free—and the home of the brave."

Canadian Bar Pays Tribute to the Late Chief Justice

■ The Editors of the JOURNAL have received the following from John T. Hackett, Q. C., of Montreal:

Extract from the Minutes of the Annual Meeting of the Canadian Bar Association, held at the Chateau Frontenac, Quebec, on the twelfth day of September, 1953:

It was moved by JOHN T. HACKETT, Q.C., (Past President of the Association) Seconded by ANDRE TASCHEREAU, Q.C., Past President of the Association)

WHEREAS the Canadian Bar Association in Annual Meeting assembled has learned of the unexpected death of the Hon. Fred M. Vinson, Chief Justice of the Supreme Court of the United States; and

WHEREAS Chief Justice Vinson was the presiding head of a great Court one of whose responsibilities, like that of the Supreme Court of Canada, is the balancing of powers between central and local legislatures; and

WHEREAS it was a Chief Justice of the Supreme Court of the United States who first provided Canadian lawyers with the conception of a national association which might dispel misunderstandings and soften asperities of sectional differences; and

WHEREAS Canadian lawyers have always maintained the closest ties with their brethren in the United States, with whom they share the common heritage of freedom under the law; and

WHEREAS the late Chief Justice, throughout a brilliant career of most varied activity in the legislative, executive and judicial branches of government, always conciliatory at home and neighbourly abroad, ever seeking the resolution of differences, was a faithful servant of his country and a stout defender of justice and law;

NOW THEREFORE BE IT RESOLVED: THAT THE CANADIAN BAR ASSOCIATION, realizing the grievous loss the Supreme Court of the United States has sustained in the death of their Chief Justice, the Hon. Fred M. Vinson, conveys to the members of the Court the expression of its abiding respect, sympathy and sorrow, and that the Hon. Robert G. Storey, immediate Past President of the American Bar Association, in attendance at this annual meeting, be asked to transmit this resolution to the Justices of the Supreme Court of the United States and to the family of the late Chief Justice.

Copies of the sermon entitled "Liberty Under Law", preached by Dr. Palfrey Perkins in historic King's Chapel, Boston, during the Diamond Jubilee Meeting last August, may be obtained without charge by writing to King's Chapel House, 27 Marlborough Street, Boston Massachusetts.

Books for Lawyers

THE CONSTITUTION OF THE UNITED STATES OF AMERICA. *Analysis and Interpretation. Prepared by the Legislative Reference Service, Library of Congress. Edward S. Corwin, Editor. Washington: United States Government Printing Office. 1953. $6.25. Pages xxxiv, 1361.*

Congress needs the interpretation of the Constitution. The Senate has taken the initiative. In 1913 it took steps by publication of the Constitution, with citation of appropriate Supreme Court decisions under each clause. This was supplemented in 1923 and 1924, and again in 1938. Annotations of decisions had by that time been included by Wilfred C. Gilbert, who was editor of the annotation of 1938, and who also gave counsel in the preparation of the new annotation which is here reviewed.

A motion by Senator Alexander Wiley for a revision and extension to date, and to print substantial numbers of the revised document, was approved by both Houses as of June 17, 1947.

The authority and the direction were made by the resolution to the Librarian of Congress, and the responsibility was in the hands of Ernest S. Griffith, Director, Legislative Reference Service. His time was already fully occupied, and it was necessary that he call upon another efficient man with time to undertake the supervision and essential work in the analysis and interpretation of the Constitution.

Edward S. Corwin was obtained as editor. He became McCormick Professor of Jurisprudence at Princeton University in 1918, retiring in 1946. During that period he wrote much in the field regarding the Constitution, publishing, between 1920 and 1941, seven editions of *The Constitution and What It Means Today*. During his retirement Mr. Corwin has had continued activity in the field of the Constitution. The Legislative Reference Service provided a collaborating staff, including Dr. Norman J. Small as Assistant Editor, Miss Mary Louise Ramsey and Robert G. Harris.

The analysis and annotation of the Constitution of the United States cover each section and clause with explanatory statements, and quotations from decisions of the Supreme Court of the United States, together with additional citations of cases not quoted. The judicial discussion of each portion of the Constitution exists, with more than 1,200 pages. Following this is a list of acts of Congress held unconstitutional in whole or in part by the Supreme Court of the United States (pages 1241-1254). Constitutional issues involving the validity of state statutes are not so listed, but are fully discussed under the respective constitutional provisions.

By the resolution providing for the Annotated Constitution, provision was made for the printing of 3,000 copies, of which 2,200 are for use by the House of Representatives and 800 for the use of the Senate. Use can and should be made available to all who have an interest in our Constitution, as will the greater number of practicing lawyers.

However, the lawyer must remember that the Supreme Court of the United States does not always adhere to a single construction of provisions of the United States Constitution. For example, with reference to treaties, under Article VI, Clause 2, one view was taken in *Missouri* v. *Holland*, 252 U.S. 416 (1920), and is discussed in this volume, whereas the recent case of *Moser* v. *United States of America*, 341 U. S. 41 (1951), approves cases both prior and subsequent to the *Holland* case, but in disagreement with it as to congressional power.

A further need for a frequent analysis and interpretation of the Constitution may be found in a statement by Mr. Justice Douglas: "The Constitution was written for all times and all ages. It would lose its great character and become feeble, if it were allowed to become encrusted with narrow legalistic notions that dominated the thinking of one generation." 32 *Journal of the American Judicature Society* 106 (1948).

WALTER F. DODD

Chicago, Illinois

MATERIALS ON PUBLIC CONTROL OF TRANSPORTATION. *By Carl A. Auerbach and Nathaniel L. Nathanson. St. Paul: West Publishing Company. 1953. $14.00. Pages 1,223, plus appendix.*

This is in no sense a practitioner's handbook, but rather a selection of case and other materials which is designed to acquaint the student with problems presented by federal regulation of air, sea, rail and highway transport, and, by a comparative analysis of the judicial, legislative and administrative approaches which have been made toward solution of those problems, to suggest a basis for an historic evaluation of regulatory techniques and policies whose use is not limited to the federal government's exercise of its police power over this one "public utility", the transportation industry.

In a sense the objective of a law school course based upon this volume would be philosophic, in that the authors believe that a great deal may be learned about regulation of all industries affected with a public interest from a rather careful study of particular comparative materials on the diverse branches of the transportation business. On the other hand, the practitioner with

a particular problem in the field of federal regulation may find some useful analogies in this work or at least some help toward anticipating some of his opponent's analogies. In general, however, the authors' purpose in preparing these materials seems more to be a genuine attempt to help students to acquire a foundation from which they can apply some of the lessons of the history of "public utility" regulation to the yet unsolved problems in that rather broadly designated field, rather than to assist the advocate in briefing the case at hand.

JOHN L. HAUER

Dallas, Texas

CORAM NOBIS; COMMON LAW, FEDERAL, STATUTORY WITH FORMS. *By Eli Frank, Albany: Newkirk Associates Inc. 1953. $7.50. Pages xv, 206.*

Up to about a generation ago, few lawyers in this country had ever heard of the ancient writ of *coram nobis,* or, to give it its full name, *coram nobis resident.* In recent years it has become increasingly important in criminal law as an instrument for correcting injustices that could not be reached by other existing remedies. It seems to have been born sometime in the sixteenth century, and its function was to enable a court of original jurisdiction to correct errors of fact unknown at the time of trial that might have brought about a different result had they been known.

In this scholarly and useful book, the author traces the history of *coram nobis* and its application down to the present time. It is interesting to note that until recently it was invoked more often in civil cases and only rarely in criminal cases.

Its recent rebirth in the field of criminal law may be said to stem from the concern of the Supreme Court of the United States about judgments of conviction in various state courts in which due process under the Fourteenth Amendment was alleged to have been violated. It is this reviewer's understanding that it was exhumed from antiquity by the research of Stanley H. Fuld, now a judge of the New York Court of Appeals, when he was an assistant district attorney under Thomas E. Dewey.

It had been generally assumed in most jurisdictions in this country that, once final judgment had been rendered, the trial courts were powerless to correct errors. The right to appeal existed to review errors committed upon the trial that were apparent in the record. A motion for a new trial upon the ground of newly discovered evidence could be made upon a showing of evidence newly discovered since the trial. These motions were restricted by a short statute of limitations; in New York the motion has to be made within one year after final judgment. Beyond that, a prisoner's only recourse, prior to the revival of *coram nobis,* was to executive clemency which might mitigate the punishment, but did not exonerate him.

A defendant who had been unjustly convicted and was serving a term in prison would therefore be powerless to correct the injustice without the beneficent application of this writ. Mr. Frank points out what *coram nobis* cannot do:

> . . . (a) errors of law cannot be cured by this writ and a writ will not lie where there is an adequate legal remedy; (b) the credibility of witnesses is a question of fact for the jury and not to be reviewed by coram nobis; (c) newly discovered evidence; (d) misconduct of the jury; and (e) an attack upon the sufficiency of evidence adduced before the grand jury.

The scope of *coram nobis* is succinctly stated in Judge Lehman's opinion in *People* v. *Gersewitz* (294 N.Y. 163):

> . . . But it has been generally held that, where the writ is available, it lies to reverse a judgment obtained by fraud, coercion, or duress, as where a plea of guilty was procured by force, violence, or intimidation, or where at the time of the trial the defendant was insane, when such facts were unknown to the court when the judgment was entered. . . or where the accused was prevented by fraud, force, or fear from presenting the defensive facts which could have been used at his trial, when such facts were not known to the court when the judgment was entered. . . By the decided weight of authority, however, the remedy is not broad enough to reach every case in which there has been an erroneous or unjust judgment on the sole ground that no other remedy exists, but it must be confined to cases in which the supposed error inheres in facts not actually in issue in the pleadings at the trial and were unknown to the court when the judgment was entered, but which, if known, would have prevented the judgment. . . .

The current vogue for using the writ of *coram nobis* began in New York, and there have since been more adjudications on the subject in that state than in other jurisdictions. Mr. Frank has included in his book a thorough compendium of the New York cases that will be useful to lawyers who are confronted with the same questions elsewhere.

The book, however, is not limited to New York law. *Coram nobis* has been invoked in other jurisdictions, although not always by that name. Sometimes the remedy is statutory, and sometimes it is applied upon common law principles.

There is an excellent chapter devoted to the history and experience of the use of *coram nobis* in the federal courts. The writ became statutory by the enactment of 28 U.S.C.A. §2255 in June, 1948. There is also a discussion of analogous remedies in other jurisdictions such as Illinois, North Carolina, Indiana and Wisconsin.

One of the reasons for the popularity of *coram nobis* is that in most instances its exercise is not curtailed by any statute of limitations. The author tells of a case *(People* v. *Richetti,* 302 N.Y. 209) in which a prisoner sued out a writ twenty-two years years after his plea of guilty. After a hearing he was liberated. It is in accord with our concepts of justice that a defendant who does not belong in prison should not be obliged to stay there, no matter how much time has elapsed since the rendition of final judgment. Without some procedure in the nature of *coram nobis,* such defendant would be powerless to right the wrong.

The book contains a complete set of forms, statutory references, a table of cases and an excellent table of contents. Mr. Frank has not only written an enlightening treatise on a subject that is currently engaging the attention of those concerned with the administration of criminal law; he has given lawyers who are confronted with post-sentence problems in criminal cases an indispensable tool.

NEWMAN LEVY
New York, New York

1953 COPYRIGHT PROBLEMS ANALYZED. *Lectures arranged and edited by Theodore R. Kupferman. Chicago: Commerce Clearing House, Inc. 1953. $6.75. Pages 280.*

The individuals whose lectures are printed in this volume are Arthur Fisher, our very competent Register of Copyrights; William Klein II, a member of the firm which represents the Songwriters' Protective Association and the Authors' League of America; David M. Solinger, whose practice includes the representation of many advertising agencies; Edward B. Colton, the "Negotiator" for the Dramatists' Guild; Alfred H. Wasserstrom, a member of the firm which is counsel to the Hearst Publications; Harriet F. Pilpel, a member of a firm specializing in copyright law; and Walter J. Derenberg, Professor of Law at New York University.

While the price for this volme is higher than that for the first of the series, in several respects it offers the buyer more. Professor Derenberg's very able discussion of the cloudy question of what is a work of applied art which can be protected under the Copyright Act and what is a design for a work of applied art which can be protected as a design patent under the Patent Act is illustrated by photographs of the objects in dispute in some of the reported decisions. This is a great help. Literary descriptions of the artistic resemblances and differences between two dolls are very seldom illuminating, especially when they occur in judicial opinions. This volume, unlike its predecessor, also contains that indispensable tool, an index.

Mr. Fisher confines himself to a description of the day-to-day work of the Copyright Office. He also gives a list of open questions concerning the interpretation of the Copyright Act.

The lectures reported here, other than those of Messrs. Fisher and Derenberg, can scarcely be described as impartial. That does not detract from their value. It is useful to the practitioner whose client's interests may be different from those of the clients of these lecturers to know what these men think and why they think it. These lectures contain, for example, information not easily obtained elsewhere as to the whys and wherefores of different clauses in different types of contracts. The speakers have been quite candid as to possible alternatives. Their lack of impartiality is not conscious; it is not that of the brief-writer but of the man whose nose is too close to the grindstone. On the other hand, it is the fact that they are speaking about the problems which concern them daily and of the manner in which they attempt to deal with them that gives their lectures value.

This reviewer would like to comment on one assumption which appears in several of these lectures. It is that the "author" is always an easily identifiable person or persons. This reviewer does not believe that to be true under modern conditions. Who is the "author" of a ghost-written book? Of a motion picture "based on" or "suggested by" a book by so-and-so? Of a radio script "based", in turn, on the script of that motion picture? Or, of a telephone directory or of the annotations to the annotated statutes of a state?

Many of the conceptions of "authorship" in this volume appear to move towards the ideas prevalent in Continental Europe. These ideas, it seems to this reviewer, are based on the assumption that "a man writes a book". That may still be true to some extent of books, but books have ceased to be, if they ever were, the major, or even a very important part, of the field of property protected by copyright. Much modern copyright property is group-produced. It is only convention which calls for it to be credited to some individual as the "author".

That this reviewer disagrees with many things said in this book does not detract from its usefulness to the lawyer.

KENNETH B. UMBREIT
New York, New York

THE PATENT RIGHT IN THE NATIONAL ECONOMY OF THE UNITED STATES. *By Gustav Drews. New York: Central Book Company, Inc. $5.00. Pages 211.*

The United States Letter Patent is a property right. It has its basis in the Constitution (Article I, Section 8, giving Congress power to enact legislation "to promote the progress of science and useful arts, by securing for limited times to . . . inventors the exclusive right to their . . . discoveries"). To date, over 2,650,000 patents have been issued by the United States Patent Office; over 2,000,000 have expired and are in the public domain. Copies of patents may be purchased by the public from the Patent Office at twenty-five cents each, and contents of expired patents may be freely used by those who wish to do so in the United States. Thus, the collective inventive efforts of bygone years constitute a free storehouse of technology available for general use. Yet so obscured has the true nature of the patent right become in a segment of the public and judicial mind that one Supreme Court Justice recently felt called upon to note that there seemed to be a "passion" for "striking down" patents "so that the only patent that is valid is one which this Court has not been able to get its hands on" (Mr. Justice Jackson, dissenting, in *Jungersen* v. *Ostby & Barton Co.*, 335 U.S. 560). Judge Learned Hand had also previously noted his dilemma in a dissent (*Jungersen* v. *Baden*, 166 F. 2d 807, 2d Circuit, 1948): the patent system

exists, and "yet in every concrete instance", Judge Hand stated, "we are to decide as though it did not exist as it is. In the case at bar, I can only say that so far as I have been able to comprehend those factors which have been held to determine invention, and to which at least lip service continues to be paid, the combination in suit has every hallmark of a valid patent."

How has this situation come about? A clue is presented by the very nature of the word used by Mr. Justice Jackson—"passion". In other words, more heat than objectivity has been engendered in dealing with patent cases, perhaps out of an excess of zeal to "punish" the few patent owners who have exceeded the legal limitations of their grant in exploiting their patents. To dispel the confusion and set the record straight, an authority in the field of patent law, Gustav Drews, has made a valuable contribution in *The Patent Right in the National Economy of the United States*. His opening chapter, "Confusion as to Patent Right", sets the tone of the book and indicates the course of inquiry followed.

Mr. Drews has been eminently fair in his appraisal. In his concluding chapter ("Recapitulation"), he points out that, while he originally took the patent right for granted and thought it would be necessary only to refute its opponents, he found that the proponents of the patent right were likewise guilty of misconceptions. In pursuance of his aims, he undertook to clear up the confusion as to the nature and confines of the patent right.

At the outset, he outlines the diligently contested and expensive procedure followed by an applicant for patent through the Patent Office and by appropriate appeals to the Court of Customs and Patent Appeals or the United States district courts. Anyone familiar with this procedure will rightly feel that the legal presumption of validity attending the patent grant should merit more consideration than a "passion" for "striking down" patents.

Mr. Drews has pointed out the distinctions between patents, trademarks and copyrights. Misconceptions as to the prolonging of the life of a patent, particularly a basic one, are cleared up. The alleged practice of "shelving" or putting patents "to sleep" is dealt with. A contrast is made between the American patent system and those of foreign countries. In discussing the patent right from the standpoint of substance, Mr. Drews points out that it is in the nature of a contract between the Government and the patentee: the Government granting to the patentee, for a limited period, the right to exclude others from the use of his invention, except under license, in exchange for a full disclosure and description of the invention, which, upon termination of the restricted exclusive period, will go into the public domain. In his chapter on "Patent Reward and Restriction", Mr. Drews points out that even the Soviet Government, the economy of which is radically different from that of the United States, has found it desirable to grant a reward for a limited period for the disclosure of an invention.

When the discussion turns to the question of the inevitableness of inventions and whether the patent grant is essential as an incentive, we come to more controversial ground. A strong argument has been made in favor of the contention that inventions will be made irrespective of the patent reward. It is conceded that the growth of technology is a social progress, but the fact remains that not everyone is capable of effecting the critical step forward. As Judge Hand pointed out (166 F. 2d 807, at page 812), "what better test of invention can one ask than the detection of that which others had all along had a strong incentive to discover, but had failed to see, though all the while it lay under their eyes?" An early Supreme Court decision (*Wilson* v. *Rousseau*, 45 U.S. 646) recognized the value of the patent grant, stating that "every honest social system must shield such inventions, and every wise one seeks undoubtedly to encourage them".

In concluding his investigation, Mr. Drews summarizes the factors that establish that the patent right has a definite and valuable position in the economy of the United States. All who wish to clarify their thinking with respect to patents will find Mr. Drews' analysis provocative and helpful.

A. W. Deller

New York, New York

Recent Books

Conservation Law and Administration. A Case Study of Law and Resource Use in Pennsylvania. By William F. Schulz, Jr. New York: The Ronald Press Company. 1953. $10.00. Pages xxv, 607.

Constitution of the United States of America. Analysis and Interpretation. Prepared by the Legislative Reference Service, Library of Congress. Washington: United States Government Printing Office. 1953. $6.25. Pages 1,361.

Estate Planner's Handbook. Second Edition. By Mayo Adams Shattuck and James F. Farr. Boston: Little, Brown and Company. 1953. $10.75. Pages xxv, 610.

I.C.J. Pleadings. Anglo-Iranian Oil Company Case (United Kingdom v. Iran). Leyden: A. W. Sijthoff's Publishing Co. (Official Distribution Agent: Columbia University Press). 1953. $6.00. Pages 809.

Learning Parliamentary Procedure. By Alice Sturgis. New York: McGraw-Hill Book Company, Inc. 1953. $5.50. Pages xvi, 358.

Legal Aspect of Money. By F. A. Mann. London: Oxford University Press. 1953. $6.00. Pages xxv, 334.

Notable British Trial Series: The Trial of Jeannie Donald. Edited by John G. Wilson. London: William Hodge and Company, Limited. (Copies may be obtained from The British Book Centre, Inc., 122 East Fifty-fifth Street, New York 22, New York). 1954. $3.25. Pages 305.

Short History of Parliament, 1295-1642. By Faith Thompson. Minneapolis: University of Minnesota Press. 1953. $4.50. Pages x, 280.

Review of Recent Supreme Court Decisions

George Rossman
Editor-in-Charge

COMMERCE

Federal versus State Control of Air Line Rates Between Mainland and Catalina Island

■ *Public Utilities Commission of California* v. *United Air Lines, Inc.*, 346 U.S. 402, 98 L. ed. (Advance p. 99), 74 S. Ct. 151, 22 U.S. Law Week 4030. (No. 87, decided November 30, 1953.)

The facts of this case are stated only in the dissent: The California commission directed United Air Lines to file a tariff schedule for flights between the mainland of California and Catalina Island, which is part of California. The question was whether the state or the federal government had jurisdiction over the rates, the air line contending that the Civil Aeronautics Act vested exclusive control in the federal Civil Aeronautics Board.

Per curiam, the Supreme Court reversed without opinion a three-judge federal district court's award of a declaratory judgment sustaining the air line's view. The Court cited *Public Service Commission* v. *Wycoff*, 344 U. S. 239, 97 L. ed. 291, 73 S. Ct. 236, 22 U. S. Law Week 4077 (1952), as authority.

The CHIEF JUSTICE took no part in the consideration or decision of the case.

Mr. Justice DOUGLAS, joined by Mr. Justice REED, wrote a dissenting opinion which argued that no purpose was served by remitting the air line to hearings before the state board which, if the district court was correct, had no jurisdiction.

The case was argued by Wilson E. Cline and Everett C. McKeage for the commission and by H. Templeton Brown for United Air Lines.

Reviews in this issue by Rowland L. Young.

COURTS

Use of Mandamus To Test Change of Venue from One United States District to Another

■ *Bankers Life and Casualty Company* v. *Holland*, 346 U. S. 379, 98 L. ed. (Advance p. 85), 74 S. Ct. 145, 22 U. S. Law Week 4023. (No. 16, decided November 30, 1953.)

The question before the Court in this case was the appropriateness of mandamus to vacate a severance and transfer order entered by a United States district judge on the ground of improper venue. The original action was for treble damages under the Sherman Act, it being alleged by petitioners that the insurance commissioners of Georgia and Florida, one other individual and four insurance companies had conspired to injure petitioner's business. The United States District Court for the Southern District of Florida held that venue was not properly laid in the case of the insurance commissioner of Georgia and ordered the action against him severed and transferred to the Northern District of Georgia, where he resided. The Court of Appeals refused to issue a writ of mandamus to compel the district judge to vacate the order of severance and transfer.

On certiorari before the Supreme Court, Mr. Justice CLARK held that the writ of mandamus was inappropriate. The Court declared that the order of severance and transfer was within the discretion of the trial judge and involved no abuse of judicial power, even if erroneous, a point not decided. Petitioner's remedy lay in appeal from the final judgment, it was held. To accept petitioner's view of the case, the Court said, would be to hold that every interlocutory order that is erroneous may be reviewed by mandamus, and the office of the writ "would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction". The Court also refused to accept the argument that mandamus would "prevent judicial inconvenience and hardship" occasioned by delay of appeal on the question of the transfer of venue—"it is established that the extraordinary writs cannot be used as a substitute for appeal"—and held that petitioner had not met the burden of showing that its right to the issuance of the writ was "clear and indisputable".

Mr. Justice DOUGLAS concurred in the result.

Mr. Justice FRANKFURTER, joined by Mr. Justice JACKSON and Mr. Justice MINTON, wrote a dissenting opinion in which it was argued that the writ of certiorari should have been dismissed as improvidently granted.

The case was argued by Charles F. Short, Jr., for petitioner and by M. H. Blackshear, Jr., for respondents.

GAMING

Federal Act Prohibiting Shipment of Gambling Devices Not Applicable To Local Dealers in Such Devices

■ *United States* v. *Five Gambling Devices, United States* v. *Denmark, United States* v. *Braun*, 346 U. S. 441, 98 L. ed. (Advance p. 123), 74 S. Ct. 190, 22 U. S. Law Week 4037. (Nos. 14, 40 and 41, decided December 7, 1953.)

These were attempts to test the constitutionality of the Act of January 2, 1951, which prohibits the shipment of gambling machines in interstate commerce and requires dealers in such machines to register their businesses and file a monthly report

as to each device sold and delivered. Dismissal of the cases by the federal district courts was upheld by a divided Supreme Court.

Mr. Justice JACKSON announced the judgment of the court and delivered an opinion in which Mr. Justice FRANKFURTER and Mr. Justice MINTON joined. This opinion took the position that the Act did not apply in these cases since the Government failed to allege how the defendants or the libeled articles were involved in interstate commerce.

Mr. Justice BLACK joined by Mr. Justice DOUGLAS, wrote an opinion concurring in the dismissal on the ground that Congress intended to reach all sales of gambling devices, both interstate and local, but that the Act was void for vagueness. This opinion pointed out that dealers were required to register "in such district", with no explanation of what was meant by that.

Mr. Justice CLARK, joined by the CHIEF JUSTICE, Mr. Justice REED and Mr. Justice BURTON, wrote a dissenting opinion which argued that the statute applied to these cases and that it was neither void for vagueness nor an unwarranted invasion of states' rights. The dissent argued that the literal language of the Act covered these cases ("... *every* manufacturer of and dealer in gambling devices shall file with the Attorney General an inventory and record of *all* sales and deliveries"), that the meaning was quite definite, even though it was not a "model of draftsmanship", and that there was no interference with local activities, merely a requirement of information in aid of enforcement of Congress' conceded power to ban interstate transportation.

The cases were argued by Robert L. Stern for the United States and by Shelby Myrick for appellees in Nos. 40 and 41.

LABOR LAW

Discharge of Employee for Disloyalty to Employer Not an Unfair Labor Practice

■ *National Labor Relations Board* v. *Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U. S. 464, 98 L. ed. (Advance p. 137), 74 S. Ct. 172, 22 U. S. Law Week 4031. (No. 15, decided December 7, 1953.)

In this case the Court upheld a decision of the National Labor Relations Board, refusing to order reinstatement of picketing employees on the ground that they had been discharged "for cause". The employees did not strike, but engaged in peaceful picketing in their off-duty hours, continuing to work and draw their pay. The company discharged ten of them when they began distributing handbills that stated that the company was supplying inferior TV programs to the community. The NLRB ordered reinstatement of one man, found to have no connection with the distribution of the handbills, but refused to order reinstatement of the rest. The Court of Appeals remanded to the Board for further consideration and for a finding as to the "unlawfulness" of the employees' conduct.

Mr. Justice BURTON, speaking for the Court, reversed, holding that the employees' conduct came under Section 10 (c) of the Taft-Hartley Act, which provides that "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged . . . for cause". The Court stressed the fact that the pamphlets attacking the company were identified as issued by station employees and made no reference to their labor dispute with the company. The Court declared that it could find no occasion to remand the cause to the Board.

Mr. Justice FRANKFURTER, in a dissenting opinion in which Mr. Justice BLACK and Mr. Justice DOUGLAS joined, declared that the sole issue was whether the Court of Appeals erred in remanding the cause to the Board to determine whether the employees' conduct was "unlawful". The dissent argued that the Board's finding that the conduct was "indefensible" did not make plain whether the Board was employing the proper standard as the basis for its decision.

The case was argued by Dominick L. Manoli for the NLRB and by Louis Sherman for Local No. 1229.

LABOR LAW

Local Retail Automobile Dealer Subject to National Labor Relations Act

■ *Howell Chevrolet Company* v. *National Labor Relations Board*, 346 U. S. 482, 98 L. ed. (Advance p.—) 74 S. Ct. 214, 22 U. S. Law Week 4060. (No. 34, decided December 14, 1953.)

The question here was whether a retail automobile dealer was subject to the provisions of the National Labor Relations Act. The NLRB had found Howell, a California company, guilty of unfair labor practices and had issued an order which the Court of Appeals for the Ninth Circuit enforced.

Mr. Justice BLACK, speaking for the Court, affirmed. In deciding that the company came within the statute, the Court cited the facts that Howell's vehicles were purchased and assembled in California, that 43 per cent of its merchandise was shipped interstate, and that General Motors reserved "sweeping control" of the dealers' affairs, even prescribing a uniform accounting system for its dealers. All of this, the Court said, "emphasized the interdependence of Howell's local and General Motors' national activities".

Mr. Justice DOUGLAS dissented without opinion.

The case was argued by Erwin Lerten for Howell and by Marvin E. Frankel for the NLRB.

LABOR LAW

Power of State Court To Enjoin Picketing Forbidden Both by State and Federal Statutes

■ *Garner* v. *Teamsters, Chauffeurs and Helpers Local Union No. 776 (A.F.L.)*, 346 U. S. 485, 98 L. ed. (Advance p. —), 74 S. Ct. 161, 22 U. S. Law Week 4055. (No. 56, decided December 14, 1953.)

The Court here decided that Pennsylvania courts were without power to enjoin picketing by a labor union in violation of both federal and state labor relations statutes.

Petitioners obtained a state injunction prohibiting respondents' peaceful picketing of their trucking business. No labor dispute was in progress, and the state court found that the sole purpose of the picketing was to coerce petitioners into compelling or influencing their employees to join the union.

Mr. Justice JACKSON, speaking for a unanimous Supreme Court, affirmed the judgment of the Supreme Court of Pennsylvania holding the National Labor Relations Board to have exclusive jurisdiction. The Court pointed out that the NLRB was vested with power to entertain petitioners' grievance, issue its own complaint against the union and obtain an injunction to prevent the irreparable injury to its business that petitioners alleged. The Court reasoned that the same desirability of uniform administration of the policies of the National Labor Relations Act which prevents the federal courts from intervening in such cases also precludes state court intervention.

A considerable part of the opinion was devoted to petitioners' argument that the NLRB enforced only public rights, whereas petitioner was seeking to invoke state equity powers to protect a private right. The Court answered this by saying that, even assuming that the national act did protect only public rights—a point not decided—the same was true of the state statute on which petitioners relied. To the extent that the private rights may conflict with those of the public, the Court added, the former are superseded.

The case was argued by James H. Booser for Garner and by Sidney G. Handler for the union.

SECURITIES AND EXCHANGE

Agreement To Arbitrate Held Void Under Securities Act of 1933

■ *Wilko* v. *Swan*, 346 U. S. 427, 98 L. ed. (Advance p. 114), 74 S. Ct. 182, 22 U. S. Law Week 4044. (No. 39, decided December 7, 1953.)

A conflict between the policies of the United States Arbitration Act and the Securities Act of 1933 was settled in favor of the latter here. Petitioner Wilko, a customer, began an action against the respondent partners in a brokerage firm to recover damages under the Securities Act for their allegedly false representations that led Wilko to purchase stock which he was later forced to dispose of at a loss. Respondents moved to stay trial under Section 3 of the Arbitration Act, in accordance with terms of margin agreements to submit all controversies to arbitration. The question was whether the agreement to arbitrate was a "condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision" of the Securities Act which Section 14 of that Act makes "void".

Mr. Justice REED, for the Court, held that the agreement to arbitrate was void under the Securities Act. Declaring that the Securities Act was drafted with an eye to the disadvantages under which buyers labor, the Court said that, by waiver of his rights to sue in courts prior to any violation of the Securities Act, the buyer would surrender the wide choice of courts and venue given him by the statute and would surrender them at a time when he was less able to judge the weight of the handicap placed by the Act upon his adversary. The Court also pointed out that, while the arbitration proceeding would be subject to the Securities Act, the agreement was for an unrestricted submission and the arbitrators' interpretation of the law was not subject to judicial review for error.

Mr. Justice JACKSON noted that he concurred insofar as the Court's opinion "construes the Securities Act to prohibit waiver of a judicial remedy in favor of arbitration by agreement made before any controversy arose", but he thought it unnecessary to decide that the Arbitration Act precluded any judicial remedy for the arbitrators' error of interpretation of a relevant statute.

Mr. Justice FRANKFURTER, joined by Mr. Justice MINTON, dissented, arguing that the advantages of arbitration should not be denied to the parties in the absence of any showing that settlement by arbitration would jeopardize the rights of the plaintiff.

The case was argued by Richard H. Wels for petitioner, and by William H. Timbers for the Securities and Exchange Commission, which intervened as *amicus curiae*, and by Horace G. Hitchcock for respondents.

SHIPPING

Liability of Owner for Injuries Sustained by Employee of Third Party Working Aboard Ship

■ *Pope and Talbot* v. *Hawn*, 346 U.S. 406, 98 L. ed. (Advance p. 101), 74 S. Ct. 202, 22 U. S. Law Week 4048. (No. 13, decided December 7, 1953.)

This was a diversity of citizenship action filed in a federal district court in Pennsylvania by Hawn to recover damages for injuries sustained in a fall while he was doing carpentry work aboard a vessel berthed in the Pennsylvania waters of the Delaware River. An employee of the Haenn Ship Ceiling and Refitting Corporation, Hawn alleged that his injuries resulted from the vessel's unseaworthiness and from the negligence of Pope and Talbot, the owner. The jury found that the ship was unseaworthy, that both Pope and Talbot and Haenn had been negligent, and that Hawn's own negligence had contributed 17½ per cent of his damages.

Mr. Justice BLACK, speaking for the Court, held that, under admiralty law, Hawn's contributory negligence was no bar to recovery, and the lower courts had correctly considered it in mitigation of damages. The Court also reasoned that Pennsylvania law was not applicable, since Hawn was injured on navigable waters while working aboard a ship, his "right of recovery is rooted in federal maritime law". Federal law would control, the Court added, even if Hawn had been seeking to enforce a state-created remedy for his injuries.

Pope and Talbot also contended that the judgment against it should be reduced by the amount of compensation payments made by

Haenn to Hawn under the Longshoremen's and Harbor Workers' Compensation Act, which Hawn had agreed to refund from his judgment. The Court rejected this contention, saying that Section 933 of the latter act specifically permitted an employer to recoup his compensation payments out of any recovery from a third person negligently causing such injuries.

The Court refused to overrule or distinguish *Seas Shipping Company v. Sieracki*, 328 U. S. 85, 90 L. ed. 1099, 66 S. Ct. 872, which allowed recovery to a stevedore injured while loading cargo aboard a ship. Hawn's need for protection, the Court declared "was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage".

Mr. Justice FRANKFURTER wrote a concurring opinion which declared that the finding of the ship's being unseaworthy supported the judgment and that the Court's opinion needlessly decided that alternative rights of recovery existed.

Mr. Justice JACKSON, joined by Mr. Justice REED and Mr. Justice BURTON, dissented, arguing that the case was covered by the Longshoremen's and Harbor Workers' Compensation Act and that there was no justification for extending the rights of seamen under the maritime law to workers such as Hawn.

The case was argued by Mark D. Alspach for petitioner, by Charles Lakatos for Hawn, and by Thomas F. Mount for Haenn Ship Ceiling and Refitting Corporation.

WAR

Draft Exemption Extended to Jehovah's Witness

■ *Dickinson* v. *United States*, 346 U. S. 389, 98 L. ed. (Advance p. 92), 74 S. Ct. 152, 22 U. S. Law Week 4026. (No. 57, decided November 30, 1953.)

Dickinson, a member of the Jehovah's Witnesses sect, was convicted of violation of the Universal Military Training and Service Act when he refused to submit to induction into the Army. He had been classified I-A by his local board over his contention that he was entitled to exemption from service as a "regular minister of religion".

The Supreme Court overturned the conviction in an opinion written by Mr. Justice CLARK. The opinion rested upon the uncontradicted fact that Dickinson devoted 150 hours a month to religious activities, (delivering public sermons, door-to-door preaching, conducting home Bible studies and presiding over meetings). He lived on $35 a month earned by repairing radios; he spent about five hours a week on this work. There was nothing in the record to disprove Dickinson's claim of exemption and the board had apparently rested its classification on a suspicion and skepticism as to his status.

The Court stressed the fact that the classification orders of the selective service boards are final and not subject to review by the courts, but said that since Dickinson had met the statutory requirements, which gave him a prima facie claim for exemption, "The task of the courts . . . is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities." The Court could find none here. The opinion carefully pointed out that the Act does not permit direct judicial review of selective service classification orders, but ruled that the courts "may properly insist that there be some proof that is incompatible with the registrant's proof of exemption" when the local board rules against exemption.

Mr. Justice JACKSON, joined by Mr. Justice BURTON and Mr. Justice MINTON, dissented in an opinion that argued that the Act left the question of classification entirely in the hands of the board and that only in the case of affirmative proof by the registrant that the board had misconstrued the law or acted arbitrarily could the courts intervene.

The case was argued by Hayden C. Covington for petitioner and by Robert W. Ginnane for the United States.

A Correction

■ The introductory paragraph to the article by Kenneth B. Hawkins, "Discovery and Rule 34: What's So Wrong About Surprise?", on page 1075 of the December issue of the JOURNAL incorrectly stated that Mr. Hawkins' article was adapted from an address delivered before the Section of Judicial Administration at the Annual Meeting in Boston last August. The address was given before the Section of Insurance Law. We sincerely regret the error.

What's New in the Law

The Current product of Courts, Departments and Agencies

George Rossman • **EDITOR-IN-CHARGE**
Richard B. Allen • **ASSISTANT**

Antitrust Laws . . . professional football.

■ On the heels of the Supreme Court's decision in the *Baseball Cases,* 74 S. Ct. 78, that organized baseball is not engaged in interstate commerce within the meaning of the antitrust laws, the Government and the National Football League have played to a tie in the United States District Court for the Eastern District of Pennsylvania.

At stake in the football case was the validity of certain restrictions on the telecasting and broadcasting of professional football games. For this reason, the Court declared, it was immaterial whether professional football itself was engaged in interstate commerce, since the violations alleged concerned radio and television, both of which are in interstate commerce under *Lorain Journal Co.* v. *U. S.,* 342 U. S. 143. In the *Baseball Cases* the only restrictions alleged were in the internal operation of organized baseball itself.

The crux of the controversy in the instant case was Article X of the professional league's bylaws, which provides that no club shall cause or permit a game in which it is engaged to be telecast or broadcast by a station within seventy-five miles of another league city on the day that the home club of the other city is either playing a game in its home city or is playing away from home and broadcasting or televising its game on a station within seventy-five miles of its home city, unless permission is obtained from the home club. The article also provides that the Commissioner of the league may approve or disapprove contracts for the sale of radio and television rights, and that his decision is final and unappealable.

The Court found that these provisions prescribed territorial rights for each club, giving that club the power to dictate local radio and television football fare, subject of course to the Commissioner's over-all power. The Court further found that these provisions were in restraint of trade, but followed the rule that only unreasonable restraints of trade are proscribed by the Sherman Act [15 U.S.C.A. §1 *et seq.*].

Thus, the Court held, the restriction on live telecasting of an away game in the home territory on the day that the home team is playing at home is valid. This provision was found reasonable by the Court on the ground that to permit such telecasting would have baleful effects on the gate receipts of the home team, particularly if it were a weak team playing another also-ran while the televised game pitted two contenders against each other. In this regard, the Court stressed the peculiar necessity of league organization to the continuation of professional football, and said that it was necessary to protect the financial soundness of all teams, including the weak ones, to maintain the league.

But the Court found no such compulsions with regard to the other restrictions. It held that if the home team was playing an away game, the home team should have no power to restrict the telecasting of an outside game in its territory, even if its away game was being televised in its home territory, since under those circumstances there was no gate attendance to be protected. Likewise the Commissioner's authority was found an unreasonable restraint of trade. Since the evidence showed no harmful effects of radio on attendance, all radio restrictions were struck down.

(*U. S.* v. *National Football League,* U.S. D.C. E.D. Pa., November 12, 1953, Grim, J.)

Conflict of Laws . . . situs of property.

■ The Supreme Court of Texas has held that Texas law governs a devise of land and mineral interests in Texas even though an equitable conversion may have been worked by the personal representatives' transfer of the mineral interests in return for corporate stock.

The testator was an Ohio resident. His will, generally speaking, made a devise in remainder to several charitable organizations. Under a peculiar Ohio statute, invalidating testamentary charitable gifts if the will is executed within one year of the testator's death and he dies leaving lineal descendants, the remaindermen could not take. Part of the devise in question, however, consisted of land and mineral rights in Texas and the charities brought suit there to establish their rights in regard to that property.

As to some mineral rights owned by the testator in partnership, an agreement provided that the deceased partner's personal representatives should transfer to the surviving partner all the decedent's interest, receiving certain corporate stock in return.

The Court held that the mineral

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

interests were immovables and that the law of Texas, being the law of the situs, applied, and since Texas had no statute barring the charitable organizations from receiving the remainders devised to them, those provisions of the will were operative. In so doing the Court rejected the contention that an equitable conversion had taken place requiring a finding that the testator's Texas interests were actually personalty and thus subject to Ohio law as the law of the testator's domicile.

In an apparently exhaustive examination of authorities, the Court concluded that it was improper "to base the choice between conflicting laws of the situs and domicile upon the principle of equitable conversion". Since the principle is fictional, the Court said, it has no place in the field of conflict of laws, already beset with enough thorny problems of its own.

(Toledo Society for Crippled Children et al. v. *Hickok et al.,* Sup. Ct. Tex., October 7, 1953, Garwood, J., 261 S.W. 2d 692.)

Contempt . . . jurisdiction and punishment in civil contempt.

■ The Supreme Court of New Mexico has been called upon to determine limits of jurisdiction and permissible jail sentences in civil contempt proceedings in two cases growing from a labor dispute between the New Jersey Zinc Company and a local of the Mine, Mill and Smelter Workers.

In one case the company had obtained an injunction restraining the defendants from trespassing upon company property and from preventing other employees from returning to work at the company's strike-bound installation. Later, contempt proceedings were instituted by the company on the basis of violations of the injunction. Upon hearing the defendants were adjudged in contempt and fined. Meanwhile, however, the strike had been settled.

The Court held that the trial court was without jurisdiction to punish the defendants for civil contempt after the strike, which was the basis for the original injunction, had been terminated. Quoting at length from *Gompers* v. *Buck's Stove & Range Co.,* 221 U. S. 418, the Court pointed out the difference between civil and criminal contempt, saying that in the former the process of the court vindicates its order for the benefit of a private litigant, whereas in the latter the process vindicates the authority of the court for the public. The Court found the rule settled that civil contempt proceedings are abated by a termination of the proceedings from which they arose.

In the second case, related to the same labor strife, the defendants had been held in contempt for violation of the injunction and had been sentenced to ninety days' imprisonment with a provision for suspension of the sentence if the injunction were complied with. They were also given fines with a similar provision of remission of one half of the fine.

In a habeas corpus proceeding they challenged the right of the court to use a specific jail sentence in punishing for civil contempt. Such a sentence, they contended, smacked more of punishment in a criminal contempt than the idea of judicial coercion associated with civil contempt. The Court, however, rejected this contention and held that the sentence-suspension provision offered the defendants a sufficient opportunity to purge themselves of the contempt. Also, the Court observed, the Supreme Court had utilized a conditional fine as a civil contempt device in *U. S.* v. *United Mine Workers,* 330 U.S. 248.

(New Jersey Zinc Co. v. *Local 890 of International Union of Mine, Mill & Smelter Workers et al.* and *Jencks et al.* v. *Goforth,* Sup. Ct. N.M., September 25, 1953, Seymour, J., 261 P. 2d 648 and 655.)

Criminal Law . . . perjury.

■ With Judge Learned Hand dissenting, William Remington's conviction in his second perjury trial has been affirmed by the Court of Appeals for the Second Circuit, with Judge Augustus N. Hand writing the opinion.

A federal grand jury in the Southern District of New York, which was investigating possible violation of the espionage laws, indicted Remington for perjury in May, 1950. The indictment was based upon a statement made to the grand jury by Remington that he had never been a member of the Communist Party. He was subsequently convicted but the Court of Appeals reversed because of error in the charge to the jury. *U.S.* v. *Remington,* 191 F. 2d 246 (37 A.B.A.J. 847; November, 1951), cert. den. 343 U. S. 907. In that appeal Remington also contended that the conduct of the Government's attorney and the grand jury foreman had been so improper that the indictment should have been quashed. The Court did not pass upon this point but ordered the testimony before the grand jury made available to Remington upon his retrial.

The Government, however, instead of retrying Remington, secured a new indictment for perjury for statements made during his testimony in the trial on the first indictment. He was convicted again and instituted the present appeal, contending not that there was error in the second trial, but rather that he could not be tried for perjury for statements made during the first trial since that trial was based upon and was the result of an improperly obtained indictment.

The Court did not directly determine whether there was improper conduct in obtaining the first indictment, but held nevertheless that perjured statements made at a trial even under an illegally procured indictment can be prosecuted. Terming Remington's argument "rather new and novel", the Court refused to apply the wire-tapping theory that what flows from the "poisonous tree" (to use the Supreme Court's term in *Nardone* v. *U.S.,* 308 U.S. 338) cannot later be used by the Government. Here, the Court declared, Remington committed a new wrong, and to call the "perjury the

fruit of the Government's conduct, is to assume that a defendant will perjure himself in his defense". The Court also rejected Remington's claim that his first trial, on a supposedly improperly obtained indictment and where the Government might have known he would repeat his statements in his trial defense, amounted to entrapment.

(*U.S.* v. *Remington,* C.A. 2d, November 24, 1953, A. Hand, J.)

Criminal Law . . . radar speed detectors.

■ The electronic age is supplanting the good old-fashioned speed trap with radar speed-detecting devices, and the problems thereby presented to the courts are increasing. In a recent test case—apparently the first appellate consideration of the radar device—the Supreme Court of Erie County, New York, has reversed the conviction of a motorist where the only evidence of speed was furnished by the radar device. Push-button justice, the Court observed, must still be surrounded by long-established rules of evidence.

Radar detection of speed was accomplished in the instant case through the use of two police cars. A radar beam was emitted from equipment in one car and as the passing motorist drove through the beam her exact speed was presumably recorded on the electronic equipment. By radio the policemen in this car notified their colleagues in another police car about a quarter of a mile beyond, and the latter stopped the defendant and issued the ticket.

The State had quite a bit of trouble proving its case. It had no more evidence than that furnished by the radar device. The city court had received the evidence of the policemen, but the Supreme Court held this evidence was hearsay because the officers in the pick-up car could not know the reading in the radar car, and vice versa, except by hearsay.

No one seemed to be able to give a technical run-down on how the radar device operated. The city court judge refused a continuance so that an expert could be procured; the acting chief of the radio division of the police department admitted he knew nothing about radar. He was a radio man. Finally the trial judge remarked that he had tested the device himself in his own car and had found it perfect. In review the Court declared that the continuance should have been granted and criticized the judge's intrusion of his personal experience in the case.

All in all, the Court said, there was no competent evidence of guilt. Although law enforcement should keep abreast of scientific advances and scientific evidence should be admissible, the Court declared, such proof would have to be presented in accordance with established rules of evidence. As a way out, the Court suggested that the legislature might enact a statute granting radar devices a presumption of accuracy, after being certified by a state-designated authority.

(*People* v. *Offerman,* N.Y.S.C., Erie Co., October 21, 1953, Ward, J., 125 N.Y.S. 2d 179.)

Divorce . . . collateral attacks on Nevada decrees.

■ Belated collateral attacks on the validity of Nevada divorces have been turned down by California and New York courts.

The California Second District Court of Appeals has upheld the validity of a Nevada decree against a former wife's attack where the divorce was granted in 1945 after she had signed a property-settlement agreement and had entered her appearance in the Nevada action and waived service of process.

The Court quickly differentiated the case from those in which jurisdiction of the Nevada divorce court is based on substituted service. Here, the Court observed, the wife had made a full entry of her appearance and had actual notice of the time of hearing in the divorce suit, and, although she had sufficient funds to do so, chose not to employ counsel or appear personally. "Under such circumstances", the Court continued, "the courts of Nevada or of any other state have the sole right of determining the sufficiency of the residential qualifications of the litigant. . . . When [she] filed her appearance, she thereby submitted to the jurisdiction of the court."

(*Haden* v. *Haden,* Calif. Dist. Ct. App., 2d Dist., October 19, 1953, Moore, P. J., 262 P. 2d 73.)

■ In the New York case that state's Appellate Division, Third Department, was faced with somewhat similar circumstances. The parties executed a separation agreement in 1935 and the husband sojourned in Nevada in 1939 long enough to obtain a divorce in an action in which the wife gave written authorization for a Nevada attorney to appear for her. The separation agreement called for the husband to pay the wife a weekly sum "for the support and maintenance of herself and three children". While the Nevada decree specifically approved the agreement, it went on to provide that the husband pay the weekly amount "for the support and maintenance of the minor children herein, until said children marry or reach the age of majority". In 1943 the parties signed another agreement relating to custody of the children, but providing that no change should be made in the former agreement regarding support payments. Later in 1943 the husband reduced the weekly payment by one-third when one of the children reached her majority.

The wife commenced an action in 1949 for back payments and for a judgment nullifying the Nevada divorce. On the basis of the two written agreements between the parties, the Court gave the wife judgment for back support payments. Nullification of the Nevada divorce was denied, however, on the ground that the decree was "entitled to full faith and credit . . . despite the fact that [the husband] was never a resident of Nevada".

(*LaBarr* v. *LaBarr,* N.Y.S.C. App. Div., 3d Dept., November 12, 1953, Imrie, J.)

Federal Tort Claims Act . . . liability to trespassers or licensees.

■ The Federal Tort Claims Act [28 U.S.C.A. §2674] provides that the United States shall be liable in tort "in the same manner and to the same extent as a private individual under like circumstances". Applying this section, the Court of Appeals for the District of Columbia Circuit has affirmed a directed verdict for the United States where the plaintiffs were trespassers or at best bare licensees.

One plaintiff was injured when he stepped into a deep hole in a grassy plot at the Jefferson Memorial in Washington. This particular plot was not used by the public and was difficult to reach. The plaintiffs had jumped onto it in order to find a short-cut to their parked car.

The Court reviewed the duties owed to invitees, licensees and trespassers, and held that the only duty to trespassers and to bare licensees is that of no intentional injury or the maintenance of a hidden peril or "engine of destruction". The Court determined that the Government's invitation to visit the Memorial and the grounds did not extend to the particular place where the injury occurred and that the hole into which the plaintiff stepped was not an "engine of destruction". Since the plaintiff was then only a trespasser, or at best a bare licensee, he took upon himself the risk of natural unconcealed dangers which could be avoided by proper care.

(*Firfer et ux.* v. *U.S.*, C.A. D.C., December 10, 1953, Clark, J.)

Insurance Law . . . Korea again.

■ The Supreme Court of Texas is the latest appellate court to rule on the question whether the late Korean conflict was a "war" as that term is used in a life insurance policy. The Court said it was unwilling to shut its eyes to what everyone knew: yes, there had been a war in Korea. The Court thus aligns itself with the United States District Court for the Southern District of California in *Weissmann* v. *Metropolitan Life Ins. Co.*, 112 F. Supp. 420 (39 A.B.A.J. 829; September, 1953), with a New Jersey court in *Stanbery* v. *Aetna Life Ins. Co.*, 98 A. 2d 134, and with the United States Court of Military Appeals in a noninsurance case in *U.S.* v. *Bancroft*, 3 U.S.C.M.A. 3 (39 A.B.A.J. 917; October, 1953). On the other side of the question is the Supreme Court of Pennsylvania in *Beley* v. *Pennsylvania Life Ins. Co.*, 373 Pa. 231, cert. den. 74 S.Ct. 34 (39 A.B.A.J. 411; May, 1953.)

Factually the instant case was somewhat different from the ordinary run of Korean cases. Here the insured was not killed in Korea, but died in a plane crash in Alaska. Of course he was in the service and was traveling on official orders at the time of the crash. In common with the other cases, however, the beneficiaries were striving to save their double indemnity.

(*Western Reserve Life Ins. Co.* v. *Meadows*, Sup. Ct. Texas, October 7, 1953, rehearing denied November 11, 1953, Smedley, J., 261 S.W. 2d 554.)

Labor Law . . . non-Communist affidavits.

■ Inquiry into the truth or falsity of union officers' non-Communist affidavits filed under the Taft-Hartley Act [29 U.S.C.A. §159(h)] is the function of the Department of Justice and not the National Labor Relations Board, according to the Court of Appeals for the District of Columbia Circuit.

Actually the Board had referred the affidavits in question to the Department of Justice for investigation and possible perjury actions. The Department brought the officers before a grand jury in the Southern District of New York but they claimed their constitutional privilege and remained silent. Although it returned no indictments, the jury recommended that the NLRB declare the unions out of compliance with the Act because of the refusal to testify. This the Board attempted to do by issuing a notice and order requiring the officers to reaffirm their affidavits or lose compliance status for their unions. The officers and unions then brought the instant declaratory judgment and injunction action.

The Court declared that since the Act provided a criminal penalty for filing a false affidavit, it was clear that enforcement was a Justice Department function, and that the Board's function was administrative only. The Court further felt that the drastic penalty resulting from a finding of noncompliance, *i.e.*, denial to the union of the Act's benefits, should not be incurred simply because a union officer might have deceived the union as well as the Board with a false affidavit.

The Court remarked that the non-Communist affidavit provision was an incentive to the union membership to rid itself of Communist leadership. But, the Court said, to impose the penalty of excluding a union from the Act "upon the great mass of innocent union members is as reckless as firing a shotgun into a crowd of people in an attempt to stop one who is picking their pockets".

(*Farmer et al.* v. *United Electrical, Radio and Machine Workers of America (UE) et al.*, C.A. D.C., December 4, 1953, Bazelon, J.)

Municipal Corporations . . . zoning.

■ An attempt by a county to prohibit strip mining of coal through a zoning resolution has been struck down by the Supreme Court of Illinois as an unconstitutional confiscation of property without compensation.

At the time of adoption by the county board of supervisors in 1949 of the zoning resolution a strip-mining coal company was severing coal by that method in the county. By the terms of the zoning law, however, strip mining was prohibited on 1,300 adjacent coal acres the company owned and as to which it had made sizable expenditures in preparation for mining. The gross value of the coal in the prohibited zone was $25,000,000. For strip-mining purposes, the company's holdings had a value of $5,000 per acre as against a

value of $250 per acre for farming purposes. After being stripped the land would be worth about $5 an acre, although by scientific reclamation and rehabilitation the value could be returned to $75 to $100.

The Court held that the zoning resolution as applied to the coal company bore no substantial relation to the public health, safety, morals or welfare. The opinion stressed that the effect of the resolution was to deprive the company of its property without any showing of commensurate benefit to the public. The Court cited many cases in which zoning had been overturned by it where the proscribed use of the property rendered it several times more valuable to the owner than the permitted use.

(*Midland Electric Coal Corp.* v. *Knox County et al.*, Sup. Ct. Ill., September 24, 1953, as modified on denial of rehearing November 16, 1953, Bristow, J., 115 N.E. 2d 275.)

Selective Service . . . conscientious objectors.

■ Although in *Estep* v. *U.S.*, 327 U.S. 114, the Supreme Court stated that classification decisions of local draft boards are final unless the board was without jurisdiction because there was "no basis in fact for the classification", litigation involving conscientious objectors claiming wrongful classification and induction continues.

In a recent case the Court of Appeals for the Eighth Circuit reversed a conviction for failure to submit to induction on the ground that the local board's classification of the defendant as I-A was groundless. After having claimed previous deferments, the defendant claimed a status as a bona fide member of the Jehovah's Witnesses sect and, as a believer in its principles, opposed to military service. Before a hearing officer of the Department of Justice, however, he said that he was not opposed to the use of force to defend his life, home or fellow Jehovah's Witnesses. Neither did he contend he was an all-out pacifist. He said that he recognized the right and duty to fight if Jehovah commanded him to do so. This, in his opinion, would then be a "theocratic war".

The Court held that a person's willingness to use force in self-defense was not a valid ground for denial of conscientious objector status, where the person's bona fide religious belief is undisputed. The Court ruled, moreover, that a person is a conscientious objector when he objects to a flesh-and-blood war, whatever may be his attitude toward a religious war.

(*Taffs* v. *U.S.*, C.A. 8th, December 7, 1953, Woodbrough, J.)

Trials . . . misconduct of counsel.

■ Misconduct of trial attorneys has resulted in reversals and orders for new trials in two recent cases coming before the New York Supreme Court, Appellate Division, First Department.

In one case the offending counsel was the defendant's attorney in a personal injury action in which a child had been struck by the defendant's automobile. The attorney subpoenaed a neighbor and began a line of questioning indicating that he believed the witness had seen the accident, whereas she stated that she had not, but had merely seen the child lying in the street afterwards. He then produced and offered in evidence a written statement of the witness, taken by his investigator, which showed the witness had not seen the accident but that the witness' daughter had seen it.

The Court held that this line of conduct created a false impression upon the jury that the witness knew something unfavorable to the plaintiff's case but was withholding her testimony. It was a clear attempt, the Court declared, to get before the jury incompetent and hearsay evidence with an implication that the evidence was fair but was being excluded for technical reasons. The Court thought this required reversal.

(*Nicholas et al.* v. *Rosenthal*, N. Y. S. C. App. Div., 1st Dept., November 24, 1953, Cohn, J.)

■ In the other case the offending counsel represented a husband seeking a divorce by way of counterclaim in his wife's separation action. The attorney had personally conducted the investigation, had shadowed the wife and was present at the culminating adultery "raid". At the trial he testified extensively about his investigation and his observations at the "raid".

The Court said that as a result of this the attorney's position as an "overall strategist, investigator and witness must have been impressed upon the jury". The Court pointed to Canon 19 which states that a lawyer should avoid testifying on behalf of his client, except as to merely formal matters or "when essential to the ends of justice". There was no compelling necessity in the present case, the Court observed, since other witnesses also testified to the same facts. "The record shows that the trial lawyer's word and his oath were in issue", the Court said. "Especially in a case involving such delicate issues, charged with high emotional pressure, the trial was not a fair one regardless of cumulative proof."

The Court also found the attorney was guilty of making offers of evidence which he knew the Court would properly reject, in violation of Canon 22.

(*Weil* v. *Weil*, N. Y. S. C., App. Div., 1st Dept., November 10, 1953, *per curiam*.)

Wills . . . presumption of revocation.

■ The Supreme Court of Wisconsin has refused to apply the doctrine of revocation of will by presumption where the testator had expressed satisfaction with the provisions of his will three weeks before his death.

The testator had executed three copies of the will and had taken one home with him, leaving the other two at the office of his lawyer. After his death the copy which he had kept with him could not be located, but the proponents offered one of the other executed copies. The contestant sought to invoke the doctrine of presumption of revocation.

The Court conceded that the doctrine was good Wisconsin law and

that in an applicable case it would also operate to bar copies of the will. But the Court felt the evidence that the testator had referred to his will with satisfaction shortly before his death overcame the presumption. The Court declared that only a preponderance of the evidence is necessary to rebut the presumption.

The fact that the testator lived with the contestant and that the latter made the unsuccessful search for the will was also considered by the Court. Whatever virtue the presumption of revocation has, the Court observed, "is seriously diminished when it must depend on a search made by those whose interests will be impaired by production of the will."

(In re Donigan's Will, Sup.Ct. Wis., November 3, 1953, Brown, J., 60 N.W. 2d 732.)

Workmen's Compensation . . . attorney's fees.

■ Under the New Jersey workmen's compensation law, a claimant's attorney, if he prevails, may be allowed a reasonable fee for his services in appealing a determination through to the Supreme Court of the state. In a recent case the Appellate Division of the Superior Court was faced with a situation in which the employee's award was $296.43 and the allowed attorney's fee $2,850. The case had had a highly litigious background, including reargument in the Supreme Court of New Jersey.

The Court upheld the fees as reasonable against several attacks. The employer conceded that the attorney would be entitled to a percentage fee, but the Court refused to compensate the attorney "beyond that modest figure . . . by the cozy warmth of the applause flowing from . . .victory". Another employer theory was that the fee should not be more than the attorney might have discreetly invested in resisting the appeals of the company. But this sum, the Court observed, "might have been symbolized by a cipher". It was also suggested to the Court, and rejected, that the criterion should be what the claimant might have paid had the fee been his responsibility.

(Neylon v. *Ford Motor Co.,* Super. Ct. N.J., App. Div., October 14, 1953, Jayne, J.A.D., 99 A. 2d 664.)

What's Happened Since

■ On December 14, 1953, the United States Supreme Court:

AFFIRMED the Court of Appeals for the Ninth Circuit's decision in *Howell Chevrolet Co.* v. *NLRB,* 204 F. 2d 79 (39 A.B.A.J. 412).

Department of Legislation

Charles B. Nutting, Editor-in-Charge

■ Although the subject of congressional investigations has been discussed at great length in this and other publications, the following note by Harold M. Keele of the Chicago Bar, formerly Counsel of the Select Committee To Investigate Foundations, 82d Congress, is a most valuable contribution since it constitutes a clear, concise and objective statement of the history and functions of investigating committees.

Note on Congressional Investigations

by Harold M. Keele

■ At this time, when lawyers frequently are asked their views on congressional investigations, it might help them to form balanced opinions if they kept in mind a few fundamental facts concerning the institution of the legislative inquiry such as its antiquity, its proper functions and its importance in a democratic form of government.

Like most instrumentalities of government, the congressional investigation is not new. Neither is the use to which certain investigations are currently being put nor the raging winds of controversy which engulf them. Congressional investigations are only three years younger than the Government of the United States. In 1792 the House instituted an investigation of the failure of the military expedition against the Indians in the Northwest Territory. In 1818 the Senate initiated its first investigation with an inquiry into General Jackson's conduct of the war against the Seminoles, and the military reverses suffered by the Union forces in the first months of the Civil War led, in 1861, to the first joint investigation conducted by both houses of Congress. It is noteworthy that all these "firsts" were occasioned by events growing out of wars and the heated passions that war engenders. Indeed every major war has accelerated the tempo of congressional investigations and it may be said that one of the by-products of war is an avalanche of congressional investigations, particularly those of a ventilating or informing type such as are presently engaging the attention of the country.

But if we are to trace the genesis of legislative committees of inquiry, we must go far beyond the beginnings of our own Government. When the Pilgrims landed in 1620 the British Parliament had been experimenting for some time with the device of a committee armed with power to compel the attendance of persons and the production of documents and with power to punish contumacious and prevaricating witnesses. The real development of the institution of the legislative inquest as a necessary part of the legislative process began, however, with the establishment of the supremacy of Parliament in 1688. By 1689 a number of parliamentary committees of investigation were in operation. Among them were committees "to inquire who has been the Occasion of the Delays in sending Relief over into Ireland, and particularly to Londonderry",[1] and "By what means the Intelligence came to be given to their Majesties' Enemies, concerning the several Stations of Winter Guards of their Majesties' Navy; and likewise into the Miscarriage in the Victualing of the Navy; and the Transportation of the Army; and all other things relating to the War, both by Sea and Land, the Last Year."[2] (Who, reading these titles, can doubt that either human nature or the legislative processes have not changed in two and one-half centuries?)

When the infant colonies established their representative assemblies, it was only natural for them to assume the general powers and procedures enjoyed by the British House of Commons which served as their prototype, and the records demonstrate that they availed themselves of the power of a legislative body to act through the instrumentality of committees of inquiry with power to subpoena and to punish for contempt. By the time our Constitution was framed, the role and function of the legislative inquiry in a democratic form of government was well understood and generally accepted. Its place as the logical concomitant and indispensable subsidiary of the legislative power has never been seriously challenged and the Supreme Court, with one notable exception,[3] has shown a wise and understandable reluctance to interfere with or impose significant limitations upon the Congress in the use of this legislative tool.

Since the first investigation in 1792 there have been literally hundreds of investigations covering almost every conceivable field of inquiry. The *Congressional Quarterly*[4] estimated that the 82d Congress alone appropriated $5,700,000 for special investigations involving some 236 studies—admittedly a record.

What, then, are the functions of of this much-used arm of government? Disregarding those investigations into the elections and conduct of members of Congress which are instituted to protect the power, integrity and dignity of the legislative branch, congressional investigations may be divided roughly into three categories according to their purpose or function: (1) those that have for their purpose the obtaining of information bearing upon legislation, which for convenience we shall term legislative inquiries; (2) those which examine into the operations of the executive branch and of administrative agencies with a view to

1. 10 Comm. Journal 162 (1689).
2. *Ibid.* 278.
3. *Kilbourn v. Thompson*, 103 U.S. 168 (1880).
4. Vol. X, No. 398, 941-944.

determining the degree of honesty and efficiency with which they are conducted, which we may designate as supervisory; and (3) those which seek primarily to inform and mould public opinion and are variously termed informing or ventilating investigations.

Of these, the one which is most widely accepted and oftenest used is the legislative inquiry, by which Congress seeks to inform itself of the facts essential to intelligent legislation. The importance and value of this type of congressional inquiry in the formulation of legislation is universally conceded by courts and scholars and is so obvious to even the casual observer that it scarcely warrants elaboration. Landis, in his memorable article in the December, 1926, issue of the *Harvard Law Review*, states it thus: "It needed no argument for Montesquieu to conclude that a knowledge of the practical difficulties of administration was a *sine qua non* of wise legislative activity. But such knowledge is not an *a priori* endowment of the legislator. His duty is to acquire it, partly for the purposes of further legislation, partly to satisfy his mind as to the adequacy of existing laws. Yet the ultimate basis for the duty is the broader presupposition of representative government that the legislator is responsible to his electorate for his actions. Responsibility means judgment, and judgment, if the word implies its intelligent exercise, requires knowledge."[5]

The second or supervisory type of investigation is, under our system of government with its ingenious arrangement of checks and balances, as important as the legislative inquiry. The argument is well stated in the following quotations from Landis: "Laws however do not administer themselves. It is to the conduct of the individuals charged with their execution that one must look in order to judge the effectiveness of the existing system. The inescapable fallibility chargeable to the human mechanism of administration must be weighed and apportioned; but, if there are abuses within the competency of Congress to correct, their character must be known";[6] and further, "Congress is the constitutional guardian of the public purse. Every public servant draws his salary only by its will. The conduct of public servants, their efficiency and their integrity, must then be subject to the severest scrutiny of that organ of the government that determines whether or not they shall subsist. . . . This demand that expenditures of departments shall be continually subject to the scrutinizing eye of Congress has increased. There has been a growing insistence upon accounting for money appropriated. But in accountings, unwillingness, born of mismanagement, to disclose methods of expenditure must be overcome. For such a situation the instrument of an investigating committee, armed with power to send for persons and papers becomes a necessity of government."[7] With the expanding nature of our democracy and the creation of vast administrative agencies charged with carrying out policies only broadly defined by Congress, the value of this power to supervise through investigation, which has been termed "the strongest weapon against corruption in executive departments notoriously lax in policing themselves", becomes readily apparent.

The third and most controversial type—the ventilating or informing investigation—is considered by some students of government to be even more important than the legislative investigations. Woodrow Wilson in discussing legislative duties in his book *Congressional Government* said: "Quite as important as legislation is vigilant oversight of administration; and even more important than legislation is the instruction and guidance in political affairs which the people might receive from a body which kept all national concerns suffused in a broad daylight of discussion. The informing function of Congress should be preferred even to its legislative function."[8] Wilson was not alone in his view of the importance of the informing function. Other scholars of note such as Bagehot and Bryce have stressed it, and indeed, some writers on the subject have made out a case for congressional investigation on the basis of the informing function of Congress.

It is the informing or ventilating type of investigation which is making headlines today. Reference has been made to the fact that controversies engendered by congressional investigations are not new. While the power of Congress to investigate rarely has been questioned in responsible quarters, controversies as to the application, methods and procedures of such investigations are practically as old as congressional investigations themselves. However, it becomes quickly apparent to the researcher that not all the criticisms leveled at congressional investigations have been entirely objective. Moreover, as Senator Morse pointed out in a speech in the Senate in February of last year,[9] the quarter from which criticism comes depends in part upon whose ox is being gored. The point is well illustrated by the following quotations: "The senatorial debauch of investigations —poking into political garbage cans and dragging the sewers of political intrigue—filled the winter . . . with a stench which has not yet passed away. Instead of employing the constitutional, manly, fair procedure of impeachment, the Senate flung self-respect and fairness to the winds. As prosecutor the Senate presented a spectacle which can not even be dignified by a comparison with the persecutive scoldings of Coke and Scroggs and Jeffreys, but fell rather in popular estimate to the level of professional searchers of the municipal dunghills." The second quotation: "Proposing, of course, that wrong-doing, impropriety and unwholesome standards in public life should be exposed, critics who have

5. Landis, "Constitutional Limitations on Congressional Power of Investigations", 40 *Harv. L. Rev.* 153 (1926).
6. *Ibid.* 206.
7. *Ibid.* 194.
8. Woodrow Wilson, *Congressional Government* (1901) 297-303.
9. *Cong. Rec.* Senate, February 20, 1953, 1373, 1376.

nothing to say for the astounding corruption and corrupting soil which have been brought to light, seek to divert attention and shackle the future by suggesting restrictions in the procedure of future congressional investigations."

The first quotation is taken from a 1925 *Illinois Law Review* article written by Dean Wigmore in which he castigated the Teapot Dome investigations.[10] The second is taken from an article entitled "Hands Off the Investigations" by Felix Frankfurter, now Justice Frankfurter, which appeared in the May 21, 1924, issue of the *New Republic*.[11] In those days it was the conservative elements which pointed with suspicion and viewed with alarm while the liberals cheered on the forces of investigation. Today the roles are reversed. Such is the shifting climate of political opinion! And in this connection we should remember that Congress is the instrument of the people. It is a common error to think of the highly controversial investigations now going on as the invention and sole property of a few highly articulate Representatives and Senators. Nothing could be further from fact. Without the approval of Congress as a whole the investigations would end. Without the approval of the electorate Congress would not vote appropriations for the investigations. Until such time as it can be demonstrated that Congress no longer represents the sovereign will of the people it seems irrefutable that what Congress does, whether as a Committee of the Whole or by standing or select committees, it does by and with the consent of the people.

10. 19 *Ill. L. Rev.* 452, 453 (1925).
11. *New Republic* 329 (May 21, 1924).

BAR ACTIVITIES

Paul B. DeWitt · Editor-in-Charge

■ The 54th annual meeting of the Nebraska State Bar Association was held in Omaha on November 12 and 13. On the day preceding the annual meeting the association conducted an institute on "Appellate Procedure" in co-operation with the Committee on Continuing Legal Education of the American Law Institute and the American Bar Association. Speakers on the institute program were Frederick M. Deutsch, of Norfolk, Nebraska; Clarence A. Davis, of Lincoln, Nebraska, who is presently serving as Solicitor of the Department of the Interior; and Judge Herbert F. Goodrich, of Philadelphia, Pennsylvania, Judge of the United States Court of Appeals for the Third Circuit.

The speaker at the association luncheon on November 13 was William J. Jameson, of Billings, Montana, President of the American Bar Association. At the annual dinner Roy E. Willy, of Sioux Falls, South Dakota, spoke briefly on the objectives of the American Bar Association, and Jerry Giesler, of Beverly Hills, California, entertained the capacity crowd in attendance with "Trial Reflections from the Defense Table".

Julius D. CRONIN

Rinehart-Marsden

The afternoon of the first day of the convention and the forenoon of the second day were devoted to excellent programs by the Section on Insurance Law, the Municipal Law Section, the Junior Bar Section, the Section on Real Estate and Probate Law and the Section on Administrative and Labor Law.

Entertainment for ladies included a luncheon and style show on Thursday and a luncheon and tour of Offutt Air Force Base on Friday.

All previous attendance records were broken with a total registration of 864.

Officers elected for 1954 are Julius D. Cronin, of O'Neill, President; Leon Samuelson of Franklin, Elmer M. Scheele, of Lincoln, and Oscar T. Doerr, of Omaha, Vice Presidents; and Judge Harry A. Spencer, of Lincoln, Member at Large of the Executive Council.

■ The department of Bar Activities was greatly curtailed this month not because of lack of diligence on the part of the Editor-in-charge, but because of the loss of the bulk of the copy somewhere between Mr. DeWitt's office in New York and the editorial offices of the JOURNAL in Chicago. It is believed that the material was lost in the Christmas mail. Next month's issue of the JOURNAL will contain the news of state and local bar associations that our deadline makes it impossible to publish this month.

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Harry K. Mansfield, Chairman.

Continuity of Partnerships for Federal Income Tax Purposes

■ In 1919 the Treasury issued a ruling which, following the common law of partnerships, held that the death or withdrawal of a partner dissolved a partnership for tax purposes and required the filing of a return covering the period from the beginning of the taxable year to the date of dissolution. A second return was then required for the remaining portion of the taxable year. O. D. 228, 1 Cum. Bull. 190 (1919). This early ruling has been revoked, and it is now the position of the Internal Revenue Service that a change in the membership of a partnership resulting from the death, withdrawal, substitution or addition of a partner, or an adjustment of interests among existing partners does not, of itself, terminate a partnership for income tax purposes. Revenue Ruling 144, Internal Revenue Bulletin, No. 16 (August 3, 1953) page 29. At page 31 the Ruling states:

> Ordinarily, a partnership will be treated as continuing where the business of the partnership, or a substantial portion thereof, is continued. The returns of a continuing partnership should continue to be filed on the basis of the annual accounting period previously established by the partnership.

Unlike a corporation, a partnership is not, of course, a tax-paying entity. The individual partners are the taxpayers, and must report and pay the income tax upon their respective shares of partnership income whether or not it is in fact distributed to them. For this reason the return of the partnership is of an informational nature. Treas. Reg. 118, §39.187-1. For a good discussion of the problems involved in relating the partnership income to that of the individual partners, see Rabkin and Johnson, "The Partnership Under the Federal Tax Laws", 55 *Harv. L. Rev.* 909 (1942).

The Tax Court has held that the death of a partner does not terminate the taxable year of the partnership so far as the surviving partners are concerned. *Mary D. Walsh,* 7 T. C. 205 (1946). Accord, *Heiner* v. *Mellon,* 304 U. S. 271 (1938). It has also been held that a partnership's basis in its assets is not affected by a change in the membership of the firm. *Robert E. Ford,* 6 T. C. 499 (1946); *Estate of Aaron Lowenstein,* 12 T.C. 694 (1949), affirmed *sub nom. First National Bank of Mobile* v. *Commissioner,* 183 F. 2d 172 (C.A. 5th, 1950), certiorari denied, 340 U.S. 911 (1951). These cases are cited in Revenue Ruling 144 as forming a proper foundation for the reversal of O. D. 228, *supra.* While for some purposes a partnership may be terminated under state law by a change in membership, the new policy of not disturbing the accounting period in instances where the business of the firm is continued is factually sound. Many partnerships, especially those formed for conduct of the professions, the investment banking or brokerage business or other activity which for legal or other reasons may not be conducted by corporations, have longer continuous existence than many corporate enterprises.

However, in giving effect to the recognition of substance over form in this instance the Treasury sounds a warning note for the future. The last paragraph of the Ruling states that it is not intended that a partnership will invariably be treated as a unit intervening between a partner and partnership transactions for federal tax purposes, citing *Commissioner* v. *Whitney,* 169 F. 2d 562 (C.A. 2d, 1948) and *Neuberger* v. *Commissioner,* 311 U. S. 83 (1940).

In the *Whitney* case, the taxpayers were members of J. P. Morgan and Company, a New York partnership, and as such, sold a part of the partnership assets to a newly organized trust company. On some of these assets there were gains and on others losses. The Court of Appeals for the Second Circuit, reversing the Tax Court, held that the word "individual" in §24 (b)(1)(B) of the Internal Revenue Code included a partnership and the losses were not deductible.

The *Neuberger* case involved the brokerage firm of Hilson and Neuberger. In 1932 the firm derived a profit of $142,802.29 from the sale of securities which were not capital assets. This amount, added to the partnership's other income and reduced by its deductions, resulted in net income of $109,651.16 of which Neuberger's distributive share was $44,158.55. During the same year, Neuberger had a loss of $25,588.93 on his individual as distinguished from firm market operations. This loss arose out of transactions in securities which were not capital assets and Neuberger deducted from his gross income the full amount of his loss. The Supreme Court sustained the position of the taxpayer, reversing both the Tax Court and the Second Circuit, on the ground that the word "gains" in §23 (r) (1) of the Revenue Act of 1932 permitting deduction from gross income of non-capital losses only to the extent of such gains, included gains from sales or exchanges of partnership securities.

It should be further noted that this ruling does not consider the complex problem of the effect of the partner's death on the treatment of his share of the partnership profits. On this point, there is an unresolved conflict among the Courts of Ap-

peals, with all circuit courts considering the question except the Second, permitting the deceased partner's share of partnership profits to be reported on the basis of the partnership's taxable year if his estate remains as a partner. For fiscal year partnerships, this result prevents a bunching of income in the decedent's final return. This ruling, in emphasizing the continuation of the partnership generally, may evidence Treasury acquiescence in this result.

Contributed by Committee Member James E. Thomas

Activities of Sections and Committees

SECTION OF ANTITRUST LAW

■ David T. Searls, Chairman of the Section of Antitrust Law, has announced that a dinner will be held at the Hotel Mayflower in Washington, D. C., on April 1, 1954, preceding the Spring Meeting of the Section on April 2. For the meeting a symposium has been designed to provide general practitioners with practical advice on how to try an antitrust case. A program is planned in which attorneys of the Department of Justice and of the Federal Trade Commission will discuss the problems and procedures involved in cases coming within their respective jurisdictions. One of the purposes of the dinner is to provide the opportunity for members of the Section to meet informally the attorneys of the Department of Justice and Federal Trade Commission, including those who will be the speakers the following day. In the past such meetings have been found to be not only socially enjoyable but mutually beneficial.

SECTION OF JUDICIAL ADMINISTRATION

■ The Section of Judicial Administration has undertaken a project which it is hoped will prove of assistance to the judiciary and to trial lawyers. The Section's Committee on the Operation of the Jury System has been instructed, on motion of Arthur F. Lederle, United States District Judge for the Eastern District of Michigan, the Chairman of the Section, to prepare a series of uniform instructions to juries.

The Committee is composed of Alexander Holtzoff, United States District Judge for the District of Columbia, as Chairman; Douglas L. Edmonds, Judge of the Supreme Court of San Francisco, as Vice Chairman; and Leland L. Tolman, of the Administrative Office of the United States Courts, as Secretary. The Committee is already at work preparing uniform instructions and is planning to issue them from time to time as they are ready. It is commencing with proposed instructions for use in the federal courts. It is not contemplated that these instructions should invariably be used verbatim. They are intended as aids for judges in framing instructions in particular cases and for trial lawyers in preparing requests to charge. They necessarily would have to be adapted to the facts and issues of the case in connection with which they are used.

The Committee will welcome any suggestions during the progress of its work.

COMMITTEE ON UNAUTHORIZED PRACTICE OF THE LAW

■ This Committee is pleased to note the steps that have been taken recently by the Oklahoma Bar Association and the State Bar of Texas in employing the full-time services of able lawyers to assist the Bar in a vigorous program of protecting the public by curbing the unauthorized practice of the law and to aid in disciplinary proceedings against lawyers. The Oklahoma Bar has employed a former Assistant United States District Attorney for this program and it is believed that this two-pronged attack will have a most salutary effect in that state.

The State Bar of Texas has been fortunate in securing the services of Earl P. Hall of Fort Worth for the newly created office of general counsel. Judge Hall was formerly Chief Justice of the Second Court of Civil Appeals, having prior thereto been an associate justice of that court after having served three terms as judge of the 97th Judicial District.

Funds to establish the new office in Texas came through an increase of bar dues from $8 to $12 per year.

In accepting his new position, Judge Hall stated:

> I am elated to accept this position with the State Bar of Texas, the purpose of which is to stamp out unauthorized practice of law in this state.
>
> Even though the employment is private, yet it provides an opportunity to render service to the public. It will be my highest endeavor to stop the the unauthorized practice of law by lay persons who unlawfully write legal instruments for the public. Far too many of these instruments become the the basis for lawsuits necessarily filed in order to determine their legal import.
>
> An attorney is unlawfully practicing law when he permits his name to be used or his professional services to be

sold by a lay agency to a third party.

Such practice creates a commercial atmosphere which subjects the attorney to disciplinary proceedings provided for in the State Bar Act.

It has long been apparent that unauthorized practice of the law and unethical conduct of certain members of the Bar go hand in hand. This committee now has under investigation certain areas of activity in which these twin evils have become powerfully entrenched in a type of practice that is fabulously lucrative and which can probably never be effectively curbed through the part-time voluntary efforts of members of unauthorized practice of law committees, however able and courageous such efforts may be.

Texas and Oklahoma are to be commended for their fine examples and without intending to overlook states such as California, Illinois and perhaps others, which have long employed counsel with excellent results, this Committee cannot urge too strongly the imperative need for extending such a program to all states.

SECTION OF ADMINISTRATIVE LAW

■ Appointment, compensation and tenure of hearing examiners are subjects on which the attention of the Hearing Officer Committee of the President's Conference on Administrative Procedure is concentrating attention preparatory to reporting back to a plenary session of the Conference to be held this spring. Members attending the fall session of the Conference, held during November of 1953, heard Earl W. Kintner, General Counsel of the Federal Trade Commission and Chairman of the Hearing Officer Committee, characterize the hearing officer as the "key to this problem of delay in administrative procedure". His committee had made sufficient studies of the present status of the hearing officer to indicate that "competent hearing officers of mature and independent judgment should be secured if the authority of the hearing officers generally is to be increased". (Transcript of proceedings, page 357).

The Conference approved a recommendation to the President of the United States that an Office of Federal Adminsitrative Procedure be established but adopted a resolution to delete a paragraph of the recommendation that would have directed the office to initiate a co-operative effort "in conjunction with the Civil Service Commission and the agencies which employ hearing examiners; for the improvement of procedures and policies relating to the recruitment promotion and tenure of hearing examiners". Deletion of the paragraph was in recognition of sentiment in the Conference for awaiting recommendations and a report from Chairman Kintner's Committee. In his words "there should be a careful unbiased study before the Conference reaches any conclusion on the matter. The Hearing Officer Committee considered what might be proper steps for study. With respect to compensation, what level or levels are required to attract competent persons, should all hearing examiners have the same level of compensation or should it vary only as between agencies? Should it vary strictly along functional lines within an agency or should there be varying levels for the same general type of work? With respect to conditions of promotion, if it is determined that varying levels of compensation are suitable, who should evaluate officers for the purposes of promotion and who should promote? These are merely illustrative of the many problems that we have in mind for study by this committee" [*Ibid.* page 366].

In addition to the Chairman, the members of the Hearing Officer Committee are Joseph E. McElvain, Social Security Administration, Department of Health, Education and Welfare; Lawrence V. Meloy, Civil Service Commission; Edwin L. Reynolds, Patent Office, Department of Commerce; William F. Scharnikow, National Labor Relations Board; L. Paul Winings, Immigration and Naturalization Service Department of Justice; and Richard S. Doyle and Wilbur R. Lester, both of Washington, D. C., who represent the Bar.

Legal Ethics Institute To Be Held in Florida

■ A two-day Institute on Legal Ethics (believed to be the first bar-sponsored institute of its kind devoted exclusively to this important subject) will be held on February 26 and 27 on the campus of the University of Florida in Gainesville, Florida, under the joint sponsorship of The Florida Bar and the Eighth Judicial Circuit Bar Association. Nationally recognized speakers in the field of legal ethics, including Henry S. Drinker, of the Philadelphia Bar, and former Supreme Court Justice Owen J. Roberts, will participate in the program, which will be of interest to lawyers everywhere. Members of the Bar from all parts of the country are cordially invited to attend. Further information concerning the Institute on Legal Ethics may be secured from Dr. George John Miller of the College of Law of the University of Florida.

Practicing lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe • Editor-in-Charge

AVIATION: Frederick B. Davis, a Cornell Law School graduate of June, 1953, has an interesting and valuable piece in the 1953, summer issue of the *Cornell Law Quarterly* (Vol. 38—No. 4, pages 570-590) entitled "Surface Damage by Foreign Aircraft: the United States and the New Rome Convention". To those of us interested in limited liability for airplane accidents, the article is obligatory. In State Department language, Mr. Davis brings us up to date with the current confusion. (Address: Cornell Law Quarterly, Myron Taylor Hall, Ithaca, New York; price for a single copy: $1.25.)

COMMERCIAL CODE—A comprehensive analysis of Article 9 of the Uniform Commercial Code has been made available to the finance industry through a series of six articles in the *Quarterly Report* published by the Conference on Personal Finance Law. The articles, relating to the secured transactions, were authored by some of the leading experts in this field of the law. The Introduction to the series appeared in the Winter, 1951, issue. It was written by Harold F Birnbaum of Los Angeles.

Homer Kripke, Assistant General Counsel of the C.I.T. Financial Corporation, wrote on the "Security Agreement" and the Rights of Original Parties, which appeared in the Spring, 1952, issue.

Next in the series was the article on "Priorities and Rights of Third Parties", contributed by J. Francis Ireton of Baltimore, presented in the Summer, 1952, issue.

The Filing Provisions under Article 9 were analyzed by Milton P. Kupfer, of New York. His review appeared in the Fall, 1952, issue.

Professor Grant Gilmore of the Yale Law School dealt with the default provisions in his exposition appearing in the Winter, 1952, issue.

George R. Richter, Jr., of Los Angeles, the Editor-in-Charge of the Commercial Code Section of the *Quarterly Report,* tied the articles together in his round-up found in the Spring, 1953, issue.

The articles were collected in an "Analytical Symposium" which the Conference on Personal Finance Law distributed in limited quantity.

CRIMINAL LAW: It is usually stated that an act or failure to act is an essential element of a crime. There are, however, several crimes the essential element of which consists not in proscribed action or inaction, but in the accused's having a certain personal condition or being a person of a specified character. Such crimes are the subject of a recent article, "Vagrancy and Other Crimes of Personal Condition", by Professor Forrest W. Lacey of the University of Tennessee College of Law, appearing in the May, 1953, issue of the *Harvard Law Review.*

Significant variations from usual criminal procedure result from the fact that the crimes discussed are defined in terms of being rather than in terms of action. For example, it has been held that such criminals are at all times committing an offense, and thereby justify arrest without warrant and conviction, although the acts which evidence the condition occurred in the distant past and in another jurisdiction. On the other hand, since a present condition is the essential element, reformation of the accused bars a conviction.

Such variations from usual criminal procedure lend themselves to both frequent use and abuse by police. The courts recognize and uphold the arrest of persons suspected of probably criminal behavior on charges of such crimes as a means of crime prevention. Many constitutional problems are presented, and the constitutionality of the legislature's creating such crimes, formerly regarded as well established, must be considered doubtful in the light of recent decisions. (Address: Harvard Law Review, Gannett House, Cambridge, Massachusetts; price for a single copy: $1.50.)

FEDERAL PRACTICE: Lawrence Nirenstein in the summer issue of the *Cornell Law Quarterly* (Vol 38—No 4; pages 624-630) has a note on *Felter* v. *Sutherland Wheel Company,* 109 F. Supp. 556, which held that in a Pennsylvania federal court a nonresident motorist sued by another nonresident and served under the nonresident motorist vehicle statute of Pennsylvania does not have a venue objection. Over a long period we have worried about whether the principle of *Neirbo* v. *Bethlehem Shipbuilding Corporation,* 308 U. S. 165, would be extended to nonresident motorists sued in the federal court in the first instance by another nonresident. Most courts have reasoned that under *Neirbo* the designation of the Secretary of State for the service of process compelled by the nonresident motorists statute robbed the defendant of any venue objection. The First Circuit startled the profession by declaring *Neirbo* could not be so extended in *Martin* v. *Fischback,* 183 F. 2d 53, rather bitterly criticized by your editor and his fellow students in 38 *Virginia Law Review* 569. Lawrence Nirenstein's discussion is interesting and timely as the Supreme Court has

ended the controversy and in a majority opinion by Mr. Justice Frankfurter, the author of *Neirbo*, we are told there is a good venue objection, and the decision of the First Circuit becomes "the law". Reason is certainly the other way, and, as Mr. Justice Reed points out in an admirable dissent in which Mr. Justice Minton joins, this makes our federal venue requirements even more out of date and in need of repair. *Olberding* v. *Illinois Central R.R. Co.*, 22 U. S. Law Week 4008, 74 S. Ct. 83. See 40 A.B.A.J. 55; January, 1954. (Address: Cornell Law Quarterly, Myron Taylor Hall, Ithaca, New York; price for a single copy: $1.25.)

LABOR: What my friend, Professor Robert Karetz of Syracuse Law School, assures me is a provocative and interesting article has been written in the October, 1953, *Virginia Law Review* (Vol. 39 – No. 6; pages 765-813) by George Rose, of Indianapolis, Indiana, on "The Labor Management Relations Act and the State's Power To Grant Relief". (Address: *Virginia Law Review*, Clark Memorial Hall, Charlottesville, Virginia; price for a single copy: $1.25.)

PROCEDURE: Chief Justice Vanderbilt of New Jersey is the author of several books, the most recent of which is his *Cases and Materials on Modern Procedure*. This book has been well received by highly respected reviewers, including judges, practitioners and law professors. The *Syracuse Law Review* published a study of Chief Justice Vanderbilt's book along with an analysis of the Judge's views on teaching procedure in its Spring, 1953, issue. The article is by Eugene C. Gerhart of the Binghamton, New York, Bar, and is entitled "Chief Justice Vanderbilt and Teaching Procedure". (Vol. 4 – No. 1; pages 205-220). In it the author briefly recites the outstanding accomplishments of New Jersey's Chief Justice during his professional career in the law. Important in this connection is Judge Vanderbilt's campaign, begun in 1943, to improve the teaching of procedure in the nation's law schools. Mr. Gerhart's article discusses the Vanderbilt method in the classroom which emphasizes the use of the best simplified practice of the day. This, of course, means the Federal Rules of Civil and of Criminal Procedure. Comparative law is also stressed. Justice Vanderbilt has long had a well-known interest in judicial administration. This topic is not overlooked. In addition to setting forth comments of some of the leading reviewers of the Vanderbilt book, Mr. Gerhart points to some of the recent decisions of the New Jersey Supreme Court involving questions of procedure. This section of the article will give a cue to the reason why New Jersey ranks first today in the extent of its acceptance of the American Bar Association's Minimum Standards of Judicial Administration. Those interested in improving procedure and the teaching of procedure in its widest aspects will find the article of interest.

PROCESS: A valuable and interesting article with respect to the constitutionality of the service of process outside the state appears in the Fall issue of the *California Law Review*, (Vol. 41–No. 3; pages 383-392) written by Professor Alfred A. Ehrenzweig of California Law School with Charles K. Wills, one of his third-year students. Apparently *Pennoyer* v. *Neff* died in California with the decision in *Allen* v. *Superior Court*, decided July 28, 1953, and good news this is to the American businessman. (Address: California Law Review, Berkeley, California; price for a single copy: $1.50.)

PUBLIC UTILITIES: There is a study of "'Fair and Equitable' Distribution of Voting Power under the Public Utility Holding Company Act of 1935", by Professor Leo W. Leary of Marquette Law School in the November issue of the *Michigan Law Review* (Vol. 52 – No. 1; pages 71-110) that ought to be of great benefit to public utility lawyers. (Address: *Michigan Law Review*, Ann Arbor, Michigan; price for a single copy: $1.50.)

TAXATION: The American Law Institute for the past several years has been working towards a revision of the federal income tax laws. One of the areas in direst need of clarification involves the taxation of partnerships. The Institute has drafted a tentative statute dealing with the taxation of partnerships, which appears in the *Tax Law Review* (Vol. 9 – No. 2). There is an accompanying explanation of the proposals and the reasons for them written by Professor Stanley Surrey of Harvard Law School, Dean William Warren of Columbia Law School, Mark Johnson of the New York Bar, and J. Paul Jackson of the Texas Bar. The text of the article reviews the current status of the law of taxation in regard to partnerships, in addition to describing the proposed changes. (Address: Tax Law Review, New York University School of Law, Washington Square South, New York 3, N. Y.; price for a single copy: $2.00.)

TORTS: Dean William L. Prosser takes a busman's holiday to revisit the *Palsgraf* case in the current *Michigan Law Review*. In February, 1953, Prosser delivered the Thomas M. Cooley Lectures at the University of Michigan, which will eventually be published as "Selected Topics on the Law of Torts". This piece, "Palsgraf Revisited", 53 *Michigan Law Review* 1-32, is one of the lectures, and it is refreshing and outstanding. Prosser tells us how Cardozo heard Bohlen and others at the American Law Institute debate the *Palsgraf* case before it reached the Court of Appeals. His article is spiced with witticism and at every turn his discussion of the case benefits from his years of classroom experience. At one point Prosser takes

issue with Albert A. Ehrenzweig of his own faculty, and his conclusion takes issue with his own torts book. Michigan therefore becomes a neutral arena for a family fight. It seems to me every lawyer handling negligence would enjoy and profit by reading this fine article. We law teachers should write more of these. Good law classes certainly helped to produce this article. I regret not studying torts with Prosser because, if this be a sample, his classes must be out of this world. (Address: Michigan Law Review, Ann Arbor, Michigan; price for a single copy: $1.50.)

WAR—*"Air Warfare and Law"*: This article by C. P. Phillips, appeared in two parts, in the January and the March issues of the *George Washington Law Review* (Vol. 21). Mr. Phillips traces, in Part 1, the historical development of the laws of war in the light of their relationship to the practices of belligerents. Focussing on air warfare in particular, the study reveals the relatively light impact of legal doctrine on operational techniques of aerial warfare. The author points out that even the Nuremburg trials, which recognized the existing solid foundation of world community prosecution of war crimes, branded air war a crime only insofar as it was part of the larger crime of aggression. Part II is an assessment of post-World War II legal theories which purport to impose limits on air warfare. The author questions their positive contribution to the advancement of the short- and long-term goals of a democratic world community. The author critically comments on Spaight's 1947 edition of *Air Power and War Rights* and points out that lawyers must recognize that, if war comes, no militarily effective technique can be restricted by legal doctrines so long as war itself is the ultimate sanction behind these doctrines. In conclusion the author contends that the only workable rules are those rooted in the self-interest of all belligerents, *e.g.*, mitigatory rules in the area of military convenience; and he recommends the following, after a factual study of the recent wars and conflicts: codify convenience, where convenience can be indisputably demonstrated; leave military effectiveness alone, so long as military effectiveness remains the shield of the free world and no reciprocal advantages can be gained by its merely formal limitation. (Address: George Washington Law Review, 720 20th St., N.W., Washington 6. D.C.; price for a single copy: $1.00.)

Nominating Petitions

Illinois

■ The undersigned hereby nominate Benjamin Wham, of Chicago, for the office of State Delegate for and from the State of Illinois to be elected in 1954 for a three-year term beginning at the adjournment of the 1954 Annual Meeting:

Kaywin Kennedy, of Bloomington;
Charles E. Feirich, of Carbondale;
Richard Bentley, Warren B. Buckley, Richard H. Cain, James P. Carey, Jr., Andrew J. Dallstream, Tappan Gregory, Joseph H. Hinshaw, Edward R. Johnston, Herbert M. Lautman, Nathan William MacChesney, Timothy I. McKnight, James F. Oates, Jr., Holman D. Pettibone, Roger Sherman, Harold A. Smith, of Chicago;
James S. Baldwin, of Decatur;
Henry C. Warner, of Dixon;
Amos H. Robillard, of Kankakee;
Clarence W. Heyl, of Peoria;
William D. Knight, of Rockford;
Amos M. Pinkerton, of Springfield;
Albert J. Harno, of Urbana;
Clarence W. Diver, of Waukegan.

Nebraska

■ The undersigned hereby nominate George H. Turner, of Lincoln, for the office of State Delegate for and from the State of Nebraska to be elected in 1954 for a three-year term beginning at the adjournment of the 1954 Annual Meeting:

Hale McCown, of Beatrice;
R. L. Smith, of Chappell;
Clarence E. Haley, of Hartington;
Wilber S. Aten, of Holdrege;
James N. Ackerman, Flavel A. Wright, John R. Baylor; Thomas M. Davies, Allen W. Field, Harry A. Spencer and Robert D. McNutt, of Lincoln;
Lyle E. Jackson, of Neligh;
Earl E. Morgan and Robert H. Beatty, of North Platte;
Laurens Williams, William W. Wenstrand, Abel V. Shotwell, Harry B. Cohen and Barton H. Kuhns, of Omaha;
Julius D. Cronin, of O'Neill;
J. G. Mothersead and A. H. Atkins, of Scottsbluff;
Lowell C. Davis and Paul L. Martin, of Sidney;
Robert R. Moodie, of West Point.

Views of Our Readers

(Continued from page 96)

3. The average attorney's income is rarely the same for any 2 years. This makes it harder for him to plan ahead than it does for others with more or less fixed costs and predictable revenues. Economically speaking, the practice of law is a hazardous occupation.

4. Private insurance plans for retirement are very expensive and cannot begin to equal in value what would be received under social security.

5. It is increasingly difficult for a person starting without capital and under the present and prospective tax laws and the hazards of inflation to accumulate savings for old age.

6. A young self-employed lawyer who dies leaving a family is certainly in as great a need for insurance benefits as any other self-employed individual presently covered by the Social Security Act.

7. Lawyers often must continue working long beyond the average retirement age simply because they have not been able to accumulate the necessary savings for old age. In a very literal sense, many lawyers "work themselves to death."

8. The fact that some lawyers are presently covered while self-employed lawyers are not covered creates an anomalous situation.

9. The statement that "most good lawyers live well, work hard and die poor" is as true today as when it was uttered by Daniel Webster 104 years ago.

JOHN M. MULLEN
Boston, Massachusetts

Judge Medina on Antitrust

■ By far the most important antitrust event of the year was the publication on October 14, 1953, of the decision of Judge Harold R. Medina dismissing the complaint at the end of the plaintiff's evidence in the Investment Bankers Antitrust case, *United States* v. *Morgan*. Quite apart from any judgment of the outcome, the opinion is refreshing reading. It is Medina at his best. His forthright comments about the bankers and their ways of doing business make the opinion a "must" for any lawyer in America interested in business. While a number of the other firms have large buying departments, Medina tells you "most of this work was done in Kuhn Loeb by the partners" (page 65), and his description of the use by Otto H. Kahn and other Kuhn Loeb partners of their "show window" policy to ensnare business from their competitors rivals a Gilbert and Sullivan comic opera.

Medina makes you very clubby with great bankers and he takes you into their business confidences in such a way as to give you a first name acquaintance. Of Charles Mitchell of Blyth and Co., Inc., formerly President of National City Bank, Medina says "He is not the type artfully to contrive as the chess player who is willing to take hours on end to outmaneuver an adversary. Mitchell's strength lies in barging in and having things out without too much fancy sparring; or at least such is the portrait of him which this record paints" (page 379).

There is a minimum of law in the opinion as Judge Medina concentrates on describing in detail the investment business. As you would expect, he places great reliance upon *Board of Trade of Chicago* v. *United States*, 246 U. S. 231, from which he quotes at length. Judge Medina states, "I can find nothing in any of these cases which would permit me to conclude that the rule of reason has been abandoned or discarded. . . . Despite all the general condemnation of price-fixing, I find nothing in any of these cases which can be regarded as controlling precedent here or which binds me to hold the clauses of these syndicate agreements now under attack to be illegal per se under the Sherman Act" (page 128). Judge Medina says, "The plain truth of the matter is that the legal questions now under discussion form an area of head-on collision between the SEC on the one hand and the Antitrust Division of the Department of Justice on the other" (page 138).

In this connection the Judge of course cites and discusses the opinion of the SEC in the Public Service Company of Indiana case (National Association of Securities Dealers, Inc., Exchange Act Release No. 3700, June 13, 1945). In that case, the Antitrust Division of the Department of Justice intervened on February 10, 1944, before the SEC to attack various clauses in the agreements with respect to the bond issue as per se violations of the Sherman Act. Judge Medina states, "The filing of the brief by the Antitrust Division fell like a bombshell on the investment banking industry" (page 148). Thereafter, the SEC upheld the validity of the clauses in question as not in violation of the Sherman Act and from his study, Medina declares he agrees with their conclusions.

Started on October 30, 1947, the case has been going now six years. Trial started in November of 1950 and ended in May of 1953, taking 309 courtroom days. The transcript is between 5,000,000 and 6,000,000 words and altogether the judge had to read approximately 105,000 pages of material. One thing I think we can all say. There ought to be a better system devised to decide such an antitrust case without tying up any Judge, let alone one so fine as Harold Medina, for so long a period. The Record Press at 214-16-18 William Street, New York 38 New York, Rector 2-2638, will sell you for $8.00 a good printed copy of Medina's opinion that is very easy to read. As one of my students in my antitrust course here at New York University Law School remarked, "Medina is selling for more than Kinsey." His opinion also compares in length with Kinsey's report. It is 424 printed pages, but every one is interesting to those of us who love this antitrust circus.

ARTHUR JOHN KEEFFE
New York University Law School
New York, New York

OUR YOUNGER LAWYERS

Thomas G. Meeker, Secretary and Editor-in-Charge, New Haven, Conn.

The Illinois Junior Bar

by Stanley Balbach, of the Illinois Bar (Urbana)

■ This is the fifth of a series of articles dealing with the history and achievements of various junior bar sections throughout the country which have consistently stood high in the annual competitions for awards of merit. Each of these articles is submitted by a junior bar official of the state in question, at the request of the Secretary of the Junior Bar Conference.

■ The new by-laws of the Illinois Junior Bar Section adopted in 1952, are quite similar to those of the Junior Bar Conference of the American Bar Association. This step, tying in the work of the Illinois Junior Bar more closely with that of the national Conference, was taken under the leadership of Frank J. Roan, Jr., of Marion, Illinois, and represents the crowning achievement in reactivating a junior bar organization that was practically a war casualty.

The Illinois young lawyers have an excellent early history of participation in Conference activity, one of our most active alumni being J m Economos, of Chicago, who once served as Chairman of the national Conference.

Immediately following World War II, an effort was made to reactivate the Section, and, in 1948, under the aggressive leadership of Robert A. Stuart, of Springfield, the Younger Members Section of the Illinois State Bar Association began its work with the following six committees: Membership, Moot Court Competition (relations with law students), Public Information Program, Survey of the Condition of the Legal Profession in Illinois, Uniform Mortality Table (legislative drafting) and Meetings. The Section began an aggressive campaign to interest young members of the Illinois State Bar Association in becoming active in organized bar activities by the use of direct mail and by pictures, publicizing Younger Members Section activities in each issue of the *Illinois Bar Journal*. The success of this organizational work is best testified to by the results. Over 125 members actively participated in a program that had previously been practically defunct. The Section revived its moot court competition program, with four of the eight law schools then in Illinois entering student teams. The Committee on Public Information Program presented a series of fifteen radio programs over more than ten downstate radio stations. Another committee began a survey of the condition of the Bar in Illinois, and a study was instituted on a uniform mortality table. Four luncheon and dinner meetings were held in addition to ten meetings of the officers, executive committee and section committees. There had been no meetings during the war.

In 1949-50, under Bob Stuart's continued leadership, the Executive Committee of the Section was enlarged to give geographical representation to all portions of the state. The success of the membership program is shown by the fact that practically all members of the senior Association's committee on new members were drawn from the junior bar group. Participation in moot court competition increased, with six of the eight Illinois law schools entering teams in the competition. Reports were published in the state bar journal on the student bar associations in the law schools throughout the state and the Committee on Re-

Junior bar leaders active in the American Bar Center Drive, shown at the Annual Meeting in Boston, are, left to right, Richard H. Bowerman, of New Haven, Connecticut, retiring Chairman of the Junior Bar Conference; C. Baxter Jones, Jr., Atlanta, Georgia, Chairman of the Junior Bar Conference for 1954; Lawrence Corcoran of the Boston Bar; and Robert A. Stuart, of Springfield Illinois, retiring Vice Chairman of the Conference.

lations with Law Students was quite active in encouraging the organization of additional American Law Student Associations in the schools within the state. An innovation was the first annual meeting of the Younger Members Section in conjunction with the annual meeting of the Illinois State Bar Association.

In 1950-51, the area of operation of the Section was expanded to include fifteen committees, thirteen of which also were committees of the Junior Bar Conference of the American Bar Association for the State of Illinois. The chairman of each of the committees, which were duplicated in the Conference, was a member of both the state and American Bar Associations and served as state chairmen in both associations. The Younger Members Section achieved another first when they were hosts, together with the Chicago Bar Association's Younger Members Committee, to the delegates to the national Junior Bar Conference at the American Bar Association's Mid-Year Meeting in Chicago. The Membership Committee, which had been taken over by the senior association, was staffed with new men, and under the leadership of the current chairman, obtained more new members of the American Bar Association than had joined in many years, Illinois being third in the country in the number of new members of the American Bar Association. The Law Student Committee organized a panel discussion of the job opportunities and appointed a subcommittee to investigate the possibility of summer employment and part-time employment of law students in law offices. This program has expanded in the succeeding years, and panels are presented annually at each of the law schools within the state. The summer employment program is quite active.

Our Moot Court Committee took charge of moot court competition in the entire Seventh Judicial Circuit, and a total of eight law schools participated from the states of Wisconsin, Indiana and Illinois. The winning team represented the Seventh Circuit in the national competition in New York City.

The Courts of Limited Jurisdiction Committee expanded its program this year, pioneering on a statewide basis, the traffic court campaign "Go to Court as a Visitor, not as a Violator".

In the Association year 1951-52, the Younger Members Section continued to develop under the leadership of Ellis Fuqua, of Waukegan. The Committee on Legislative Drafting completed the draft of a proposed Life Expectancy Tables Act which was approved by the Younger Members Section and submitted to the Board of Governors of the Illinois State Bar Association.

In 1952-53, a committee composed of past chairmen of the Younger Members Section met with a committee from the Illinois State Bar Association Board of Governors and agreed on a reorganization that allowed the Younger Members Section to change its name to the Junior Bar Section of the Illinois State Bar Association and adopt a constitution similar to that of the Junior Bar Conference of the American Bar Association. The new constitution explicitly provides for geographical representation on the Executive Committee.

Indicative of the rebirth of interest in junior bar activities in Illinois was the attendance of sixty-five lawyers and wives at a dinner meeting held on the day before the annual meeting last June. At this meeting, the Chairman recognized the power of the wives, and the entertainment program was planned to include them. The section was encouraged by the action of the Board of Governors of the state association approving an item in the budget of the Junior Bar Section for the attendance of the State Chairman at the American Bar Association's Annual Meeting in Boston.

The success of the Illinois younger members group in integrating its activities with those of the Junior Bar Conference of the American Bar Association is indicated by the number of young lawyers attending the annual meetings of the national Conference. In 1944, Robert A. Stuart, of Springfield, attended the Conference meeting as the lone Illinois representative. In 1953, Illinois was one of the best represented of all the states from the standpoint of attendance at the Annual Junior Bar Conference meeting in Boston, and hundreds of Illinois young lawyers are actively participating in the Conference committee program within the State of Illinois.

Administrative Law and the Sixth Amendment

(Continued from page 110)

order may be challenged in the criminal trial, under the *Estep* case.[22] Yet, even in such cases, as the *Cox*[23] decision shows, the court may not determine for itself whether the order is valid; it may only look to see whether the order has an evidentiary basis in the administrative record. Such limited inquiry on this vital issue would appear to give the accused much less than the full trial to which he is entitled, under our Constitution, in criminal proceedings.

Certainly, as one commentator has declared,[24] in discussing cases like *Yakus* and *Cox*, because of them a situation has developed which, almost unnoticed, has undermined many of the safeguards provided by the Sixth Amendment. Whatever may be the merits of the development that has been described in this paper, it is clearly one of which it is time that the legal profession take notice. *Yakus* and *Cox* were cases which grew out of a war emergency. Their principle is not, however, limited to war-time cases. The *Spector* case,[25] with which this paper began, involves an attempt to apply the *Yakus-Cox* principle as a normal one of our public law. This cannot be done consistently with the Sixth Amendment. If that constitutional provision means anything, one accused of a crime which consists in the violation of an administrative order is entitled to a full trial on his defense that he committed no crime because the order in question was invalid. The concepts of statutory provisions for judicial review as exclusive and of a narrow scope of review may be valid and valuable ones in administrative-law cases. That is true because such cases are exclusively civil in character. They are wholly out of place in criminal proceedings. When the criminal law is used as an auxiliary of the administrative process, the ordinary concepts applicable in administrative-law proceedings must give way in favor of the constitutional right of the accused to a full and fair trial. Only thus can our administrative law be reconciled with the demands of the Sixth Amendment.

22. *Supra*, note 5.
23. *Supra*, note 11.
24. Fraenkel, "Can the Administrative Process Evade the Sixth Amendment?" 1 *Syracuse L. Rev.* 173 (1949).
25. *Supra*, note 2.

Is Legal Education Doing Its Job?

(Continued from page 124)

substantive areas of law than is now being offered to them in many schools. The necessity of improving teaching methods in the law schools requires work and effort by the faculty, and undoubtedly some expense to the school; but there is a large reserve of available time and effort for this purpose in those long and arduous hours devoted by many faculty members to legal writing for their personal advancement and the glory of Old Siwash.

The law school teacher is still a lawyer; his clients are his students. They have paid a fee for a service which he is employed to render. The student may be a necessary evil and nuisance in the life of the teacher; but no students, no teachers! I have talked to dozens of students from several law schools and to a number of teachers; I am astonished and shocked at the lack of mutual understanding and working contact. I am not sponsoring an educational good will and brotherhood society, although it could serve a useful purpose. Whether a relationship of social accessibility is established is a matter of no importance. Each teacher has a different temperament and some are better able to impart wisdom, know-how, and character than others. But I feel strongly that an obligation exists on the part of at least a representative group of faculty members to give to the student body as a part of the educational process something of themselves.

The teacher's work is not finished when the lecture is over. The answering of questions from the rostrum for ten or fifteen minutes after class is a hit-or-miss process, usually availed of by the same few students. Lawyers are important cogs in our democracy. Their character and integrity rank second (I think, first) to their knowledge of the law. All of us perform best in an atmosphere of mutual confidence and understanding. If large industrial institutions have learned to pay vast sums of money to improve personnel relations for Joe Bloak, the fireman on Boiler 4, then law schools should require that at least a part of faculty time be devoted to improve relations with students. The tenseness under which many law school students go through the entire three years, their constant worry, their uncertain knowledge of many subjects which are being taught to them, creates an atmosphere which is not conducive to anything—least of all learning. Knowledge is made available to them; but assistance in helping them to absorb it is too often at a minimum. A program which evidences some human interest in the student while he is a student should be the aim of every law school faculty.

We hear much today about the dignity of the individual, as well we should. I should like to see the day when the law student does not appear in his teacher's record merely as the occupant of seat number 67; when his efforts are evaluated on the basis of personal accomplishment witnessed by the teacher who earnestly attempts to brighten and humanize the atmosphere of the law school. This does not mean the lightening of the work load but the eradication

of the frequent sadistic attitude: "I worked like a dog when I went to law school; now I'm the professor and I'll crack the whip."

Observations on Faculty "Working Conditions"

I approach the phase of "faculty working conditions" with firm conviction but with distinct misgivings as to my ability to express myself effectively or to offer a helpful suggestion. I refer particularly to the extent to which faculty members have freedom of action. Academic freedom—yes. I could have been teaching Advanced Tatooing IIIA and nobody on the faculty, so far as I could judge, would have known the difference—at least until my students tattled. But a teacher who wishes to disagree with the administration of the law school is restrained from doing so because, to use the phrase from that amusing play, *Jacobowsky and the Colonel,* he does not have two possibilities.

Although few of us ever feel strongly enough about our opinions to be willing to resign our position in protest, nevertheless the privilege of being able to do so with the knowledge that we are free to go elsewhere is a comforting assurance. But if one resigns (even voluntarily) from a law school faculty he is faced with the taboo against soliciting another job. Recall, if you will, that the job must find the man. A law teacher's bargaining power is thus limited; he does not have "two possibilities". It follows, in my opinion, that his effectiveness in honest differences of opinion is severely limited.

True, a professorship means permanent tenure, but that doesn't solve the situation. There are still such things as salary adjustments; key courses can be turned over to other men; exclusion from policy-making decisions is a crushing treatment of a sensitive man. There are fine courageous men on all faculties, but many of us mortals are courageous in a vacuum, or, at best, in the presence of a loyal wife. It takes courage—more than many intelligent law teachers can afford to have—to urge ideas and opinions which may make for improvement in the school or in teaching methods. But if his very act of quitting puts him in an intolerable bargaining position, it seems to me that a basic shortcoming exists which goes to the very roots of freedom of action.

The consequence is that important decisions may be made without uninhibited argument. I suspect a real tendency among faculty members to withdraw into themselves more and more as the years go by—not the withdrawal of an older man, tired of life's troubles, but withdrawal based, first, on timidity, later on habit and finally and worst of all—on indifference.

The remedy is not clear. Certainly the president of the institution should not be the referee of internal problems. But there should be some assurance that on basic internal disagreements, the barrier to the president's office should be withdrawn. If the law school teacher was assured of the opportunity to solicit a job rather than to wait, like a shrinking violet, until the job finds the man, an entirely new and relaxed atmosphere might be created which would be conducive to constructive and bolder approach to legal education. Law school deans must constantly review their own relationship with their faculties to make certain that honest argument (even if occasionally unsound) be encouraged. Of course, the dean has the responsibility and duty to make many decisions, but one of his most important obligations is to encourage unrestrained discussions in every area of legal education and school administration. We lawyers—teachers or practitioners—are a strange lot of prima donnas. But that very individualism is our tremendous asset—and a wise dean must stimulate and foster it, not control it by throttling and discouraging it or permitting it to fall into disuse.

It will be argued that once a trouble maker, always a trouble maker. But any step that will remove the inhibition against freedom of expression by the more timid and less articulate faculty members is a true need in legal education. Perhaps Mr. Cantrall's suggestion (not made in his article) that law schools encourage the formation of advisory groups of alumni and practicing lawyers who will serve not merely as counselors on educational techniques, but arbitrators of administrative disputes is a solution. The very existence of a "grievance procedure" will be salutary—be it an appeal to the Dean, the President, the advisory body or to another school for a teaching post.

One passing word—academic politics. I am at a loss to describe this phenomenon. It consists primarily of a jockeying for influence and position and the resulting alignment into camps—sometimes armed! It would be amusing were it not so productive of annoyances, friction, wasted efforts and downright unhappiness which can only detract from group co-operation. The existence of this human, though childish, frailty in university life is common knowledge. It evidences an underlying sense of insecurity—the need to be on the "right side". If it could be rooted out, a more congenial atmosphere for teaching would develop. But much more important would be the benefit to school administration produced by honest differences of opinion rather than tussling for advantage.

Arthur Brisbane is said to have insisted that in the newspaper business there was no such thing as resting on laurels; you could have a dozen scoops a year; if you failed to deliver in the next year, you were out. A business executive is judged by one standard—did he make a profit this year, last year and the year before? I am not arguing for a single moment that effective teaching in law schools must be crowned by repeated spectacular accomplishments. Any law school is in competition with many other good schools. Students will not enroll unless the record of the school is good—both as to the reputation of alumni and the record on the bar examinations. But the atmosphere of the "ivory tower" does

exist. The life of a teacher has every tendency to become cloistered and sheltered, quite unlike the rugged profession itself—where the demands on abilities and the pressure on integrity are high. Yet, aside from the insecurity of academic politics and not being able to "seek employment" elsewhere, the law teacher is singularly free from competition. Once he has established himself (a task which is not easy!) there is nothing that resembles the competition for him which the outside world demands of most of us. His activity is sheltered in that he does not have to maintain a position against an adversary. Teachers should not have to vie with one another in popularity polls, in tangible accomplishments or, as I have said before, in the volume of published articles.

Once established, law teachers are not subject to the rigors that the rest of us poor mortals must meet. The reporter must have his scoops; the executive must satisfy his stockholders; the lawyer must satisfy his client. The law teacher (more perhaps than the college professor) must be goaded to avoid the ruts which are inherent in the vocation. The student is one, but not the sole, judge of a teacher's ability; the teacher must not be immune from the rigors of healthy competition any more than the rest of us. When this supervision is effectively worked out, when the phrases "ivory tower", "cloistered life", "absent-minded professor" are removed from the nomenclature of law schools, a long step will have been taken in the improvement of legal education. Teachers are for the most part highly intelligent men; they can be pretty smug in the sense that they think their way is best. This is unhealthy for them, much more so for the student and the school. Some test of continued effectiveness is in order. The great legal teachers may be presented with minor indignities as a result, but is not the price little enough to pay to elevate the mediocre teacher from ruts which are only too easy to find?

Observations on Matters of Curriculum

(E) *Curriculum.* I come, finally, to the lively controversy about the law-school curriculum which Mr. Cantrall has initiated and in which Dean McClain has very properly participated. The basic issue is raised by Mr. Cantrall when he criticizes law schools for failing to teach legal "know-how", stating: "Society's contract with the law schools is to train lawyers, not to produce half-lawyers, taught some of the theories of law but not how to put those theories into practice."[16] Mr. Cantrall does not argue that the schools should abandon the teaching of substantive law. If I read his article correctly, he is asking the law schools to review their teaching objectives and to reappraise the job which is being done.

Many educators agree that the case method probably has reached a point of diminishing returns. It has served as one of the most useful tools of legal education, but it is not the only tool. Dean Edward H. Levi of the University of Chicago Law School has stated that it is incumbent on law schools to recognize and remove the deficiency in the fields of legal writing and draftsmanship.[17] Mr. Justice Robert H. Jackson has made the complaint that law students need training *before graduation* for some of the practical experiences which will be presented to them in litigation.[18] Dean McClain is correct when he states that no school is equipped nor can ever be equipped to accomplish all that Mr. Cantrall demands. The Dean apparently has gone far in developing for Duke Law School new and resourceful teaching techniques. How many schools have done as well, I have not been able to check, but I am certain that some have not made much progress. It is these schools which must be prodded into action; the schools which have made progress must be needled into continuing alertness.

I recapitulate my own conviction that there are several prerequisites to an intelligent revamping of law school curricula. First, there must be a more critical yardstick for selecting and then testing the effectiveness of law teachers. Second, a clarification of a teacher's duty must be made. Some balance must be struck between writing and teaching. Third, the academic and monetary advancement of a teacher should be more closely related to his teaching success. Fourth, law students, too, must be treated as human beings. Fifth, law schools must not only expose the student to knowledge, they must teach it. Sixth, there must be a periodic accounting of the average law teacher, not in the sense of checking his qualifications, but rather to make certain that he has not fallen into an academic rut.

16. Cantrall, 38 *A.B.A.J.* 907.
17. Levi, Address to Chicago Bar Association (1951).
18. Jackson, "Training the Trial Lawyer: A Neglected Area of Legal Education", 3 *Stan. L. Rev.* 48 (1950).

There is a need to examine the curriculum offered in a particular school in the light of the needs of the community served. As an example, I wonder whether a forty-hour course in corporate reorganization is needed in a community which is not highly industrialized and in which one of the principal businesses is agriculture. Then, there is the need of coordination or balance between courses—the extent to which the various substantive law courses mesh into the curriculum as a whole. Thus, I cannot help but be surprised at a curriculum which requires an agency course of forty hours and at the same time allows only sixty hours for corporation law and nothing for partnership. Or, for that matter, a curriculum which does not insist upon some background in accounting before permitting its students to undertake the study of business associations, corporation law, taxation and the law of trusts.

I am concerned that there may be more than one school where no effort is made to make certain that each teaching specialist periodically enlightens the entire faculty on new trends and developments in his field. A large law office makes it its business to keep the entire professional organization aware of new developments in fields in which some lawyers are not actively participating—a sort of monthly up-dating on new legal developments. This would seem to be a minimum requirement for a law school faculty. Re-examination of the extent to which emphasis is placed on statutory interpretation in the various fields of substantive law is important. How many lawyers have come out of school quite unused to the exercise of turning to the statute first before undertaking to solve the problem?[19]

The seminar approach must be pressed with the greatest vigor, and this is not a random thought! I am loath to dispute Dean McClain's statement that even practicing lawyers cannot teach "know-how".[20] Time limitations make it impossible for them to teach all the skills demanded by Mr. Cantrall, but they, rather than the teachers who have never practiced, can come pretty close to doing a creditable job.

I am conscious of displaying colossal effrontery, but I was working on a teaching technique which, given time and experimentation, held promise. I have spelled out the details elsewhere.[21] I know it is given in some schools. A mere summary is set forth here.

The seminar was available to not more than twenty third-year students. A simple but very frequently recurring set of facts was used involving the three typical kinds of consideration—cash, intangibles and property. Three clients plan to form a new business; one puts up cash and has no interest in active management; the second is turning over an intangible (secret formula, patent, etc.) or services; the third is transferring property (real estate on a going business). Each client is represented by a student lawyer. Each group of three "lawyers" is given one or more of several assignments which include formation of a partnership; setting up a corporation; working out a closed corporation agreement. As the business grows, the "lawyers" undertake to arrange an insurance loan—one lawyer representing the lender, the other the borrower. Ultimately plans are made to sell—one group arranging a sale of assets, another the sale of stock. Each assignment, when completed, is submitted to all other members of the seminar for criticism and correction. The seminar served as a review and practical application of the law of contracts, partnerships, corporations, and taxation. It developed techniques of legal drafting; experience in bargaining; analysis of business needs; the necessity of working with other lawyers. It was the type of situation that is common in actual practice, involved several fields of substantive law, developed some of the skills of practice, offered a refreshing change from the case method and gave evidence of having stimulated the students because it was conducted as a reasonably accurate facsimile of a law office. The same technique could readily be used for estate planning, labor law or real estate transactions.

Legal education is going through a period of transition. There is a recognition of the fact that the case method needs supplementation. The educators are undertaking healthy self-criticism and the ferment that is going on can only produce improvements.[22] Mr. Cantrall must be patient, for the law schools have a difficult task and must not proceed precipitately but legal educators must not drag their feet or resist the sincere efforts of practicing lawyers like Mr. Cantrall to suggest changes. The Bar can and must help in this process, and the schools should welcome that interest and not treat it belligerently or as officious intermeddling.

19. Ballantine, 5 *Journal of Legal Education* 345 at 346.
20. McClain, page 122.
21. Orschel, "The Teaching Approach of a Practicing Lawyer", 5 *Journal of Legal Education* 515.
22. Horne, page 180.

The Inventor in the Courts

(Continued from page 106)

this union of its parts. A new part which formed the same mechanical unity would be an improvement or, at most, a new type of the old machine. The theory of the Court would deny a patent for the basic machine and grant one for the improvement or new variation. But the fact that it is not the parts themselves but the manner in which they are arranged, which constitutes the machine, shows how superficial the Court's theory is when it holds that it is the parts, not the assembly, that must show invention in the machine.

The Merchandise Handler in the A. & P. Case

We are now ready to consider the form and principles involved in the patent which the Supreme Court held not to contain any invention. Turnham, the inventor, calls his device a merchandise handler. It was made for use in those typical American institutions, self-serving grocery stores or supermarkets, which are important technological developments in retail selling. It had been found that in order to check purchases quickly, with satisfaction to both buyer and seller, it was helpful to group the purchases closely and in order on the counter between the buyer and the cashier. The merchandise handler did this by mechanical means.

A counter was provided with ends to extend on both sides of the cashier's position. A guide rail extended above the counter, near its edge, on the side next to the cashier; a strip with a recess in it, to form a slot opening upward, ran along the edge of the counter next to the customer. A U-shaped frame, with square corners, was provided with a recess on one side to fit the guide rail, and an extension on the other side, to fit into the slot. This held it in place crosswise of the counter, but allowed it to move lengthwise, back and forth, along the counter with the open end of the U toward the cashier's position. The width of the three-sided or U-shaped frame, was a little less than the width of the counter, and its length somewhat greater than its width. Since the three-sided or U-shaped frame was always over some part of the counter which would serve as a bottom, the arrangement was, in effect, a three-sided moving tray, with a stationery bottom.

In referring to the frame, the courts sometimes speak of it as a "bottomless tray", or rack, or in like language. In a technical sense, this is inaccurate and could cause confusion. Hat boxes, milk cans and frying pans have bottoms. The union between the sides of such containers and their bottoms is a structural one. The union between the sides of the tray and that part of the surface of the counter which always forms its bottom is a *mechanical* one, as we shall see, when considering the principles involved in the invention. But a part joined by mechanical union is just as much a part of a device as one joined by structural union.

While not in use the tray was left positioned at the end of the counter.

When a customer wished to check out and pay for his purchases, he placed them on the counter, within the tray or ahead of its open end. He then pushed the top of the tray toward the cashier's position. Because the top of the counter formed the bottom of the tray, a joint action occurred. The moving pressure was not upon the tray as has always occurred in prior containers, but upon the contents. Since the contents rested upon the counter which did not move, the contents moved on the counter. The friction thus provided set up a yielding resistance or conflict of forces within the tray. This is the same type of conflict of forces which operated on the raft. The yielding conflict of forces grouped the contents of the tray together and held them in that grouped position as they were moved. This Turnham had mentioned in his specifications as objectives of his device. Since both the counter top and the top of the tray acted together to accomplish the results, there was joint action, and since each supplied part of the result, there was a joint or composite result. When the goods had reached the proper place in front of the cashier, the top of the tray was drawn back to its first position. This caused the goods to be unloaded through the open end of the U-shaped form. Here the part performed by the counter top was to hold the goods in place while the frame was moved away. The part performed by the frame was to release the contents. The mechanical principle employed was conflict of direction, which is also a common means used when force is transformed into mechanical operations in applied art.

Just as the grouping of the goods and the holding of them grouped while they were moved were functions, so the unloading of the tray is a function, but seemingly a much more obvious one. It was a joint one and formed by joint action. If some of the groceries had been placed ahead of the U-shaped frame, they would have been loaded by the action. This loading capacity is also a function. It was inherent in the construction of the device and is

legally within the scope of the patent.

In some types of inventions, the material to be used by the mechanical devices is very important in evaluating the importance of particular functions or mechanical operations. The merchandise handler is such a device. The purchases would be widely varied in size, weight and form. It was not enough to move them from one place to another. Perhaps a customer bought three cans of beans. He could check them with the cashier more easily if the three were positioned standing on end together. Perhaps he bought two boxes of salt which had bargain prices marked on one end. These he would wish to arrange with the price marked ends upward. There was no rail on the outer side of the counter and if the round cans or boxes were overturned, they might roll off the counter when the tray was self-unloaded.

Perhaps the purchases would include larger packages of light cereal and a bag of coffee. The grouping action of the whole would keep these various articles from overturning and hold them as assembled without disarrangement of position or place in the assembly. Turnham was able to capitalize upon the characteristics of the purchases in order to accomplish his full objectives.[3]

The joint operation, caused because the counter also forms the bottom of the tray, seems as self-evident as the functions.

If we now analyze the device, we see first that it is a machine. The movement of the top of the tray along the counter is plainly controlled movement. It would be hard indeed to find a plainer example of force transformed into mechanical results or function than the action of the moving top of the tray grouping the groceries together and holding them in this grouped position while being moved. The principle used there is conflict of forces, just as it was in the action of the raft. The other two functions, the unloading and potential loading were performed by conflict of motion. This also is a direct transformation of force.

So four functions were performed by the *force* employed to push the top of the tray into position and draw it back. It is a classic example of applied mechanical art in a machine.

The machine is a highly elemental one because both the top of the tray and the counter are structural parts, not machine parts or elements, just as the bar and block in the lever are structural elements. Inventions consisting of new elemental machines are extremely rare.

Some members of the Court have complained because so many patents cover only new improvements, not new machines. Yet they did not know a new machine when one was before them.

We also see that the functions of the merchandise handler are built just as are the functions of the interlocking brick wall.

When the interlocking feature was added to the wall, all of the former functions were retained but a new one was added. The new function appeared as a composite, each brick supplying a part and the composite being formed by co-operation or joint action of the individual bricks. This is so of the tray and counter.

The Court noticed that the top of the counter still performed its old functions, but it failed to see that it also furnished part of the new functions. Justice Jackson says, "The counter does what a store counter has always done—it supports the merchandise while the customer makes his purchases and the merchant his sales." As we have seen, the Court was mistaken in thinking that because the elements in a combination still perform their old functions, they do not also contribute to a new function. This very thing often takes place in combinations, especially in machines.

What Are the Standards for Invention in the Court's View?

The patent had been upheld as a legal invention by the Federal District Court and the Federal Court of Appeals. Since the decision on invention is a finding of fact and not of law, it was unusual for the Supreme Court to hear the case. But the Supreme Court charged that the lower courts failed to apply proper "standards" as a test for invention. Then, in giving its own opinion, it says no such "standard" exists. It says, "While this court has sustained combination patents, it has never ventured to give a precise and comprehensive description of the test to be applied in such cases." Mr. Justice Jackson, who writes for the Court, must not have read the Expanded Metal case, where the Supreme Court itself said, "It is now perfectly well settled that a combination of elements, old in themselves, but which produce a new and useful result, entitles the inventor to the protection of a patent."[4] Both lower courts met this test because both upheld the patent as a combination of old elements producing a new result. Both also named the self-unloading of the tray as a new result, although

3. This is explained in the Turnham patent.
4. 214 U.S. 366-381.

they did not speak of it as a function.

But the Supreme Court either overlooked or ignored this because it says, "A patent for a combination which *only unites old elements with no change in their respective functions*, as is presented here, obviously takes what is already known into the field of monoply." It also says that the lower courts pointed out no new function performed by the elements. One may well wonder if the Supreme Court knows that such mechanical results are *always* functions. (The italicized words are a paraphrase of a sentence used by Justice Hunt in *Reckendorfer* v. *Faber* in a classic case which will be discussed later).

Mr. Justice Jackson also says that the rack (top of the tray) would always have pushed or pulled goods put within, just as it now does. If he means that the top of the counter and the top of the tray, when mounted and used as Turnham used them, always had potential power to operate and function as they do, he is correct. A magnetic needle placed on a pivot would always have pointed north. An airplane equipped with the Wright controls could always have been controlled in flight. Only a divine creator can supply mechanical devices with powers that are not potential in them. Creative ability in the human mind extends only to finding and using the possibilities the Divine Creator has placed in the things which man finds at hand.

We have seen how the joint action of the brick wall was dependent upon the mechanical action of the elements which would or would not co-operate with each other and that this is the key to combination or aggregation. But Mr. Justice Jackson says, "It is agreed that the key to patentability of a mechanical device which brings old factors into combination is invention. In the course of time the [legal] profession came to employ the term 'combination' to imply its [invention] presence and the term 'aggregation' to signify the absence, thus making antonyms in legal art out of words which in ordinary speech are more nearly synonyms."

Does the Court mean that it disregards the mechanical difference and that the assembly becomes a combination, joint action or not, if the court finds invention? Though not frequent, aggregations are sometimes invention. Such devices as a simple windmill, a water wheel or a wheelbarrow, are aggregations. Will the mechanical forces present here change their nature and co-operate in obedience to the Court's dictum?

To clear away the fog and confusion which ideological pressures have brought into the patent law on this subject within the last few years, we may turn to the classic decision in *Reckendorfer* v. *Faber*, 92 U. S. 347-357. It was written almost eighty years ago by Justice Hunt. It has been cited several hundred times and never limited or modified. Although Justice Jackson uses it as a reference, it seems impossible that any member of the Court could have read it and agreed with the decision.

The question presented in the *Reckendorfer* case was whether a pencil with a lead in one end for writing and a rubber in the other end for erasing was a combination or an aggregation. It is plain that Justice Hunt was not writing for any legal elect few. First, he took the question of union of structure, only. He refers to a handle with a screw driver on one end and a hammer on the other; a handle with a hoe on one end and a rake on the other; a handle with a pencil on one end and a pen on the other, as aggregations. He points out that with such devices there can be neither unity of operation nor of function (result). He then gives positive definite rules for patentability in combinations and illustrates them by well known devices. Mr. Justice Jackson's citation relates to this definition. Because the meaning is mechanically clear, precise, and positive, it follows in full.

Positive Description of Legal Combination

"The combination to be *patentable* must produce a different *force* or effect, or result in the *combined* forces or process, from that given by the separate parts. There must be a *new result* produced by their union: if not, it is only an *aggregation* of old elements. An instance and an illustration are found in the *discovery* that by the use of sulphur mixed with India rubber, the rubber could be vulcanized, and that without this agent, the rubber could not be vulcanized. The combination of the two produced a result or an article entirely different. Another illustration may be found in the frame in a sawmill which advances the log regularly to meet the saw and the saw which saws the log: the two co-operate and are simultaneous in their joint action in sawing the whole log: or in the sewing machine where one part advances the cloth and another part forms the stitches, the action being simultaneous in carrying on continuous sewing. A stem-winding watch is another instance. The office of the stem is to hold the watch,

or hang the chain, to the watch; the office of the key is to wind it. When the stem is made the key, the joint duty of holding the chain and winding the watch is performed by the same instrument. A double effect is produced or a double duty performed by the combined result. In these and numerous like cases the *parts co-operate* in performing the *final* (composite) effect, sometimes simultaneously, sometimes successively. This comes from the combined effect of the several parts, not simply from the separate action of each, *and is, therefore, patentable.*

"In the case we are considering [the lead pencil and attached rubber] the parts claimed to make a combination, are distinct and disconnected. Not only is there no new result, but there is no joint operation. When the lead is used, it performs the same operation and in the same manner it would do if there were no rubber on the other end; when the rubber is used, it is in the same manner and performs the same duty as if the lead were not on the same pencil."

It is plain that Justice Hunt was not writing merely to the legal profession. His meaning is plain to any intelligent adult. Perhaps plainer to the practical mechanic than to a lawyer.

Perhaps no one can feel a more complete sense of futility and frustration than an understanding mechanic or mechanical engineer who reads some of the present Supreme Court's legal theories regarding mechanics, and also reads and analyzes the cases the Court cites to uphold its theories. The most flagrant mechanical misuse of citations is a feature of almost every important patent decision of the present Supreme Court. The result is complete confusion.

As we have seen, Justice Jackson says that the difference between a legal combination and an aggregation is a legal abstraction and that the Supreme Court has never laid down any "precise and comprehensive description of the test to be applied in such cases". To the mechanical reader it is hard to see how Justice Hunt, whom Justice Jackson cites, could have indicated more clearly that the difference between the combination (or invention) and aggregation was one of mechanical fact, nor how he could have been more exact, precise and comprehensive in setting up a positive test for invention in such cases. Not only did Justice Hunt give the precise legal requirements, he gave clear mechanical illustrations. After speaking of the handle with a hoe on one end and a rake on the other, which had structural unity but could not have either joint operation or produce a composite result, as an aggregation, he shows the patentable combination in four simple illustrations. The first is a compound, commercial rubber, composed of India rubber and sulphur. The compound had a new physical property or function which neither the pure rubber nor sulphur had. It could be vulcanized. He illustrated the combination in two simple machines, the sawmill and the sewing machine. In the sawmill, two operations were necessary to sawing the log. The cut had to be formed and the log had to be moved. The moving carriage performed one and the saw the other; by their joint action a new composite result appeared, the carrying on of the cut. In the sewing machine, the needle and shuttle formed the loops of thread, the device for intermittently moving the cloth coacted with it. The composite or final result or function was that a continuous seam was formed. The sewing machine is an unusual combination because neither the cloth-moving device nor the sewing device performs any function in the combination it could not perform outside it. The fourth illustration Justice Hunt gives is a stem wind for a watch, which is a structure. Here one element performs two functions with the result that a double duty is performed by the device of which the structure forms a part.

In all three forms of the combination there must be a final or composite result which one part alone could not perform. In the machine there must be joint action and co-operation of the parts.

When these requirements and tests are met, Justice Hunt states without qualification that the assembly is patentable. Invention in abstract is not even mentioned. It is also plain to a mechanical mind that the counter and sliding tray, acting jointly and in co-operation to produce the new final or composite results, including the self-unloading mentioned by both lower courts, fits the requirements illustrated in the sawmill and sewing machine almost as though they had been designed for

that very purpose. Yet, as the highest possible spokesman of the legal profession, the so-called highest court offers Justice Hunt's decision to the mechanical and engineering professions as justification for its present theory that invention, perhaps the highest goal in mechanical science, is a matter of the intuition of the lawyers whom chance has placed upon the Court.

American patent law was at its best only a little over a generation ago, when the great conservative Taft and the great liberal Holmes were fellow-members of the Court. In almost all patent cases, the great liberal and the great conservative jurists saw the law alike. It was when the law was perverted by making it subject to ideological, political theories, that its present degeneration began. The present degradation of patent law should rest upon the conscience of the entire legal profession. Yet the profession sleeps. Theories that insult the intelligence of minds with mechanical understanding are still expounded by solemn jurists and received with intellectual servility by the faculties of law schools and lawyers of supposed high standing as profound legal masterpieces.

But American technological and mechanical arts cannot always wait upon the faltering legal profession. If the legal profession cannot or will not meet the responsibility, the industrial and scientific problem must be met elsewhere.

The writer of this analysis does not feel called upon to express a legal moral from it. Perhaps he is no better fitted to fill the part of legal philosopher than the jurists are to play the part of mechanical experts. But he feels that commendation is due to the jurists of the "lower" courts who, without pretending to profound knowledge either in law or mechanics, were guided by simple, legal rules and found the right answer. This particularly applies to the decision of the Court of Appeals, written by Judge Florence Allen. It emphasizes something that, since the retirement of Judge Learned Hand, perhaps the most able jurist on patent law should be a lady. To the mechanic it seems that her decisions differ from the rest in that she has faith and confidence in the law and accepts the answer that the law implies. Her decisions all represent much careful legal analysis and very little legal free thinking on mechanics, as opposed to the mechanical rationalization, which is a feature of most present-day decisions.

If pointing out that it is the jurist who relies upon the law, instead of her own intuition, who most often gives the right answer, is a suggestion, then the writer offers this suggestion to the legal profession.

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